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Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 219

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Appellant,

vs.

W. H. OSBORNE, JR., as Tax Commissioner of the State of Nebraska, GILBERT E. HAASE, as County Treasurer, Buffalo County, Nebraska, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF FOR APPELLANT.

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Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF FOR APPELLANT.

Statement of the Case.

This is a direct appeal, under Sec. 266, Judicial Code, from an order of Judges Lewis, Munger and Woodrough, sitting in the District Court, District of Nebraska, denying appellant's application for an interlocutory injunction to restrain the collection of taxes because of discriminatory assessment.

Without passing upon any other features of the application, the three-judge court—Judge Woodrough dis-

senting—denied appellant's application for an interlocutory injunction, on the ground:

> "That plaintiff for the redress of the wrongs recited in its petition had an adequate remedy at law under the statutes of the State of Nebraska in prosecuting error proceedings to the Supreme Court of the State of Nebraska, and for that reason there is no equity in the application for a temporary injunction." (Tr., 47.)

THE ISSUE ON THIS APPEAL.

The question on this appeal is whether or not the provision of the Nebraska statute for error proceedings to the State Supreme Court from the State Board of Equalization and Assessment, deprives the federal court of its equity jurisdiction to grant appellant the injunctive relief to which it otherwise plainly was entitled.

JURISDICTION OF THE FEDERAL COURT.

Appellant's petition and the evidence presented in support of the application for an interlocutory injunction show the following necessary elements of jurisdiction of the federal court:

Diversity of citizenship. Appellant is an Illinois corporation and appellees are the state Tax Commissioner and seventy-two County Treasurers, citizens of Nebraska. (Tr., 4-9.)

Requisite amount in controversy. The excessive taxes from which relief was sought amounted to over $900,000. (Tr., 20-22.)

Denial of federal rights. Appellant's property was deliberately overassessed, for state, county, town, school and road taxes, for the year 1922, at 137 per cent of actual value, while all other property in the state was intentionally and systematically underassessed at but 65 per cent of actual value. (Tr., 29.)

Actual Values.

Actual value of appellant's railroad property in the state (Tr., 29)	$ 100,000,000
Actual value of all other property in the state (Tr., 28)	4,345,000,000
Total actual value	$4,445,000,000

Discriminatory Valuations.

Assessed valuation of appellant's railroad property in the state (Tr., 18)	$ 137,000,000
Assessed valuation of all other property in the state (intentional and systematic undervaluation) (Tr., 28)	2,824,000,000
Total assessed valuation	$2,961,000,000

The discriminatory assessment increased appellant's taxes from about $900,000 to over $1,800,000. (Tr., 20-22.)

Appellant was vigilant in endeavoring to prevent the discrimination against it and protested to the State Board (Tr., 18), but without avail (Tr., 19). The action of the State Board was final (Tr., 19) and appellant was thereby deprived of the equal protection of the laws, in violation of the Fourteenth Amendment (Tr., 32-33).

Denial of appellant's rights under the constitution and laws of Nebraska. The petition alleges that the Enabling Act, pursuant to which the State of Nebraska was organized, required that lands belonging to citizens of the United States residing without the State of Nebraska never be taxed higher than lands belonging to residents of the state (13 Stat. at Large, p. 44; Tr., 10); the Nebraska constitution confirms the provisions of the Enabling Act (Neb. Const. of 1866, Art. XI; Tr., 10), requires that taxes be levied by valuation uniformly and proportionately upon all property (Neb. Const. of 1875, as Amended in 1920, Art. VIII, Sec. 1; Tr., 11) and

that no person or corporation be relieved from its proportionate share of taxes (Neb. Const. of 1875, as Amended in 1920, Art. VIII, Sec. 4; Tr., 11); the Nebraska statutes require all property to be valued and assessed for taxation at its actual value. (Comp. Stats. Neb. 1922, Sec. 5820; Tr., 12; Appendix this brief, p. 68.

EQUITY JURISDICTION OF THE FEDERAL COURT.

Appellant's petition and evidence showed the following grounds of equity jurisdiction of the federal court:

Prevention of cloud on title. Under the Nebraska statutes the taxes assessed on appellant's property became first liens on personal property November 1, 1922, and on real estate December 1st (Neb. Comp. Stats. 1922, Secs. 5822, 5823 and 5825; Tr., 12, 19 and 42; Appendix, p. 68.)

Prevention of multiplicity of suits. By statute in Nebraska it is the duty of the county treasurers to collect taxes by summary distress warrants and seizure and sale of property (Neb. Comp. Stats. 1922, Secs. 5984, 6011, 6015; Tr., 17; Appendix, p. 78); also, in the case of corporations, to demand of any officer or agent in the county all moneys in his hands with criminal penalties on the agent for failure to comply (Neb. Comp. Stats. 1922, Sec. 6017; Tr., 41; Appendix, p. 79). Appellant operates and is taxed in seventy-two counties in the state and the seizure of its money and other property and arrest of its agents in each county, would result in multitudinous suits. (Tr., 32.)

Prevention of irreparable injury. There is no statutory authority in Nebraska for the payment of less than the full amount of taxes, unless some part of the tax shall be levied for an unlawful purpose; there is no statute authorizing appellant to pay any part of its

taxes under protest so that same may be recoverable by legal proceedings or otherwise. (Tr., 42.) The valuation and assessment made by the State Board, certified to the respective county clerks, forms the basis for tax levies in each county; such taxes become a lien on property November first, and county treasurers are required by law to collect the full amount and would force appellant to pay same. (Tr., 19 and 42.) The large amount of taxes levied upon appellant's property as the result of such discriminatory assessment would be wholly lost to appellant and the seizure of appellant's property and the funds in the hands of its agents in the seventy-two counties through which it operates, would interrupt and cripple the conduct of its business as a common carrier engaged in interstate commerce. (Tr., 32.)

No adequate remedy at law. The petition alleged that for the preventive relief demanded by the case made, there exists no adequate remedy at law. (Tr., 31, 34.)

RELIEF PRAYED.

The petition prayed that the court declare invalid the discriminatory valuation and assessment of appellant's railroad property, fix the amount of taxes appellant should pay for the year 1922 on a fair valuation of appellant's property and in proportion to the valuation of all other property, which appellant tendered and offered to pay (Tr., 32 and 42), and for interlocutory and permanent injunctions, enjoining the defendants from collecting taxes on appellant's railroad property in excess of the amount so fixed by the court. (Trans., 33-4 and 44-5.)

INJUNCTION PENDING APPEAL.

After denying the application for an interlocutory injunction, the three judges entered an order restraining defendants from collecting more than 75 per cent of the taxes in question pending this appeal, upon appellant paying such per cent and giving bond in the sum of $450,000. (Tr., 54-6.)

ASSESSMENT AND COLLECTION OF TAXES IN NEBRASKA

The taxes involved are those assessed for *state, county, town, school and road purposes* for the year 1922. For such taxes all appellant's property in the State used in operating[1] purposes is assessed as a unit by the State Board of Equalization and Assessment, meeting in *May,* as a Board of *Assessment.* (Secs. 5839-40, Appendix, pp. 68-9.)[2]

The order of the State Board, assessing appellant's property was entered June 15, 1922 (Tr., 17, 123), fixing the "total actual valuation" of 2,861.60 miles of railroad at $137,589,782. Appellant contends that this assessment was $37,000,000 in excess of the actual value. (Tr., 29.)

Immediately after such valuation and assessment the State Board is required to, and did, make return there-

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[1]Machine repair shops, office buildings, storehouses and property outside of right of way and depot grounds are assessed and taxed in the county where located (Sec. 5839, Appendix, p. 68) and are not involved in this case. Also, there is a special statute (Art. VI, Chap. 61, Secs. 5859-5883, Neb. Comp. Stat., 1922) which provides a separate assessment of railroad terminal property for purposes of city and village taxation. Such taxes are not involved in this case. The provisions for notice, objections, hearing, equalization with other local property, appeal and re-assessment in Art. VI apply solely to the assessment of such local property for *city and village taxation.* Sec. 5883 (Appendix, p. 73) provides nothing in Art. VI shall apply to, or in any manner affect, the assessment, equalization, levy or collection of *state, county, township, school or road taxes.*

[2]Sections of Nebraska Compiled Statutes, 1922. Each section cited is printed at length in an Appendix to this brief, with references to pages of the Appendix.

of to the county clerks of each county in which any portion of such railroad is located (Sec. 5847, Appendix, p. 72), showing the number of miles of railroad track located in each governmental subdivision of each county, the total length of such road in each county and the average valuation per mile of road. (Sec. 5848; Appendix, p. 72.)

Pursuant to Sections 5849-50 (Appendix, p. 72), the county clerks apportion such railroad assessment among the respective governmental subdivisions, same are entered on the tax lists, and state, county, town school and road taxes are subsequently assessed thereon, as hereinafter explained.

Real and personal property of others than railroads is assessed by the local assessors and equalized by the County Boards of Equalization. (Sec. 5971; Appendix, p. 73.) The County Board is authorized to deal with real and personal property, "*except property assessed or valued by the State Board of Equalization and Assessment,*" thus specifically excluding railroad property. (Sec. 5971; Appendix, p. 73.)

Appellant's petition in this case alleges (Tr., 24-27), and a large amount of evidence was introduced in the lower court (Tr., 107-115) showing beyond question, that the local assessing officers and County Boards throughout the state, by and with the consent of the State Board, had agreed upon systematic under-valuation of all other than railroad property, which plan was deliberately carried out with the result that all other property was assessed for taxation at but 68 per cent of its actual value. (Tr., 85-98.) The evidence introduced by appellees in the court below shows that real estate of others than railroads was assessed at from 61 to 75 per cent of actual value. (Tr., 148-9.)

Sec. 5977 (Appendix, p. 75) provides that immediately after the County Board of Equalization has completed its labors the county assessor shall prepare an *abstract* of the assessment rolls of the county and the values as equalized and corrected by the County Board, and forward same to the State Board.

SEC. 5901 provides: "The State Board of Equalization and Assessment shall, on the first Monday of July of each year, meet at the state capitol for the purpose of equalizing assessments. They shall proceed to examine the abstracts of property assessed for taxation in the several counties of the state, including railroads entirely within such county, and all other property, and shall equalize such assessments so as to make the same conform to law, and for that purpose they shall have the power to increase or decrease the assessed valuation of any county or tax district, and such increase or decrease shall be made by a per centum, and the per cent of increase or decrease when made shall be certified to the county clerk of the proper county, who shall thereupon add to or deduct from the assessment of each piece or parcel of property in the county affected an amount equal to the per cent of increase or decrease fixed by the state board. The state board shall have the power in equalizing assessments, to increase or decrease the assessed valuation of any class, classes or kinds of property in any county or tax district, whenever in their judgment it shall be necessary to make such assessment conform to law; and such increase or decrease, when made, shall be certified to the county clerk and by the county clerk extended upon the tax rolls as hereinbefore provided; but in the extension of valuations the county clerk shall reject all such amounts as may fall below two dollars and fifty cents and all amounts of two dollars and fifty cents or more shall be extended as the next higher five dollars or multiple thereof, this making all valuations end in cipher or five. In the event it shall appear to the state board of equalization and assessment that a just, equitable and legal assessment of the property in the state cannot be made without increasing or

decreasing the valuation as returned by any county, the board of equalization and assessment shall issue a notice to the counties which the board deems either under-valued or over-valued and shall set a date for hearing at least five days following the mailing of such notice. At such hearing legal representatives of the counties may appear and show cause why the valuation or valuations of their county should not be increased or decreased by the State Board, and after a full hearing, the state board shall enter its order and certify the same to the county clerks of the proper counties as hereinbefore set forth in this section. The notice provided for in this section shall be mailed to the county clerk, county assessor, and chairman of the County Board. From any final decision of the state board of equalization and assessment, any person, county or municipality affected thereby may prosecute a writ of error to the supreme court and upon demand therefor the state board shall prepare and certify a transcript of its records and proceedings involved in such decision, upon payment by the party demanding the same of a fee of ten cents for each one hundred words. Notice of intention to obtain review shall be filed within ten days from the date of entry by the board, and when docketed said cause shall be given precedence by the supreme court over all civil cases." (Neb. Laws, 1921, Chapter 133, pp. 545, *et seq.*)

July 3, 1922, appellant filed with the State Board a complaint asking that the board reduce the assessment of appellant's property or increase the assessment of all other property in the state, to avoid discrimination. (Tr., 104-6.) But the board on August 2, 1922, dismissed the complaint. (Tr., 141-2.) The same date the board entered final order equalizing the assessments of the different counties (State Board's Ex. 18, Tr., 137 to 141), and certified to the county clerk of each county the results of the equalization for that county, as required by statute. (Tr., 19.) Appellees' own evidence in the court

below shows that after equalization the assessed value of real estate was only 61 to 75 per cent of actual value.

Section 5979 (App. 77) requires that immediately upon notice of the equalization proceedings of the State Board, the County Board shall make the tax levies. Section 5984 (App. 78) requires that the tax lists be delivered to the county treasurers with an attached warrant, signed and sealed by the county clerk, commanding the treasurer to collect the taxes by seizure and sale of property under distress warrants (Secs. 6011, 6015, App. 78) or by demanding of any railroad agent in the county such money as may come into his hands, under penalty on the agent for failure to comply (Sec. 6017, App. 79). Taxes levied become a lien on personal property November 1st (Sec. 5823, App. 68) and on real estate December 1st (Sec. 5822, App. 68).

The rates of taxation are uniform on all property. The order of the State Board entered June 15, 1922 (Tr., 17, 123) assessing appellant's property at more than actual value, and the orders of the State Board entered August 2, 1922, dismissing appellant's complaint against said assessment (Tr., 141, 2) and equalizing and confirming the intentional and systematic underassessment of all other property (Tr., 137-142), subjected appellant to deliberate and systematic discrimination in taxation.

The Nebraska statutes do not provide for suits by the state to collect taxes or to create liens for same on property. No such suits are necessary. The statutes make it the duty of the county treasurers to collect taxes in the most summary and arbitrary manner by seizure of goods and money. The liens attach by virtue of the statute. There is no statutory provision for payment under

protest of any part of taxes alleged to be discriminatory, and no right to recover same by suit or otherwise.

APPELLANT'S CONTENTIONS.

The two judges in the District Court found in Section 5901 what they held to be an adequate remedy at law, and because thereof, they held that the federal court could not grant equitable relief. The provisions regarding the writ of error had just been added by amendment in 1921 and when this assessment was made in 1922, and when the suit was instituted, had not been construed by the courts. The writ of error offered, at best, but a doubtful, uncertain and inadequate remedy. Furthermore, it does not operate as a supersedeas. There is no provision in Section 5901, or any other statute, which suspends, or gives the taxpayer the right to have suspended, the collection of taxes or the seizure of property or the clouds upon title thereto, pending writ of error from the State Board to the Supreme Court. Appellant's case clearly called for equitable relief. The discrimination was deliberate and systematic. Preventive relief was necessary to avoid multiplicity of suits, clouds on title and irreparable injury. Only an injunction restraining the county treasurers from collecting the taxes would afford adequate relief.

There was diversity of citizenship and requisite amount in controversy and a plain case for the exercise of the equity jurisdiction of the federal court. It is fundamental that the equity jurisdiction of the courts of the United States over judicial controversies between citizens of different states, is derived from the Constitution and Acts of Congress in conformity therewith and cannot be ousted by remedies at law in state courts.

Appellant contends that in determining whether or not

the equity powers of the federal court should have been exercised in this case, the statutes of Nebraska may be looked to for but three purposes:

First. To determine whether or not the statutes provide a substantive right to recover taxes paid under protest, or other legal remedy, which could be enforced at law in the Federal Court, as in *Singer Sewing Machine Company* v. *Benedict,* 229 U. S. 481. In this case appellees do not contend that any remedy at law in the Federal Court, was available to appellant.

Second. To determine whether or not a civil suit must be brought by the state to collect taxes, which the taxpayer may defend on any legal ground and might remove to the Federal Court if there was diversity of citizenship and requisite amount in controversy. (*Upshur County* v. *Rich,* 135 U. S. 467.) It is not contended in this case that any suit was provided for or necessary to collect taxes.

Third. To determine whether the assessment complained of was *final,* or was subject to an administrative correction by some other tribunal, which had power to *fix final valuation,* as in *Pittsburgh, etc., Ry.* v. *Board of Public Works,* 172 U. S. 32. In this case the assessment was final and any review by the Supreme Court of Nebraska, would be purely judicial. (*Bacon* v. *Rutland R. R. Co.* 232 U. S. 134.)

Appellant contends that:

1. The assessment of appellant's property by the State Board was final. Any review by the Supreme Court of Nebraska on writ of error was purely judicial. As the judicial stage had been reached, appellant had the right to litigate the validity of the final order of the State Board in the United States District Court.

2. This is a case in equity between citizens of different states. Appellant's right, under the Constitution and laws of the United States, to invoke the equity jurisdiction of the Federal Court, cannot be impaired by state statutes providing judicial remedies in state courts.

3. The supposed remedy by writ of error to the

Supreme Court of Nebraska, is, at best, inadequate, doubtful and uncertain.

4. The cases relied upon by the two judges in the District Court do not justify denial of an injunction in this case.

SPECIFICATION OF ERRORS RELIED UPON.

The District Court of the United States for the District of Nebraska erred:

First. In denying appellant's application for an interlocutory injunction. (Tr., 52.)

Second. In holding that for the redress of the wrongs recited in the petition appellant had an adequate remedy at law under the statutes of the State of Nebraska in prosecuting error proceedings to the Supreme Court of the State of Nebraska. (Tr., 52.)

Third. In holding that the uncertain, doubtful and speculative provisions of the laws of Nebraska with reference to error proceedings to the State Supreme Court, afforded appellant a plain, adequate and complete remedy. (Tr., 53.)

Fourth. In holding that the United States District Court was without jurisdiction by reason of a remedy at law under the state statutes when such remedy was not available at law in the federal court. (Tr., 52.)

Fifth. In refusing to issue an interlocutory injunction restraining defendant tax officials from collecting such part of taxes assessed against appellant's property as the court might find were based on an excessive and discriminatory valuation. (Tr., 53.)

Sixth. In refusing to issue an interlocutory injunction to restrain defendant tax officials from collecting from appellant taxes based upon intentional and systematic inequality of assessment, whereby appellant's property was deliberately assessed at more than its actual value and all other property, taxed at the same rate, intentionally and systematically assessed at less than actual value, in violation of appellant's right to the equal protection of the laws, guaranteed by the Fourteenth Amendment to the Constitution of the United States, and in violation of appellant's right to equality in taxation as required by the constitution and laws of the State of Nebraska. (Tr., 53.)

I.

The assessment of appellant's property by the State Board was final. Any review by the Supreme Court of Nebraska on writ of error was purely judicial. As the judicial stage had been reached, appellant had the right to litigate the validity of the final order of the State Board in the United States District Court.

THE ASSESSMENT OF APPELLANT'S PROPERTY BY THE STATE BOARD WAS FINAL.

Under the statutes of Nebraska, the State Board of Equalization and Assessment has original and *exclusive* jurisdiction of the valuation and assessment of railroads (*State ex rel* v. *State Board of Equalization and Assessment*, 81 Neb. 139, 115 N. W. 789), and is "by law constituted a special tribunal for the purpose of assessing railroad and telegraph properties" for which purpose it is "given exclusive jurisdiction." (*State ex rel. Bee Building* v. *Savage*, 65 Neb. 714, 91 N. W. 716.)

TAXATION IS NOT A JUDICIAL FUNCTION.

In *Pittsburgh, etc. Ry.* v. *Board of Public Works*, 172 U. S. 32, at page 39, this court said:

> "The levy of taxes is not a judicial function. Its exercise by the constitutions of all of the states, and by the theory of our English origin, is exclusively legislative."

In *Hutchinson* v. *City of Omaha*, 52 Neb. 345, 72 N. W. 218, the court held, Syllabus 6:

> "The levying of a tax is not a judicial act."

In *Upshur County* v. *Rich*, 135 U. S. 467, Mr. Justice Bradley said (p. 477):

> "The principle to be deduced from these cases is, that a proceeding, not in a court of justice, but car-

ried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and cannot, in any just sense, be called a suit; and that an appeal in such a case, to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quantity, proportion and value, is not a suit; but that such an appeal may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other."

This decision was quoted from with approval by Chief Justice Taft in *Commissioners of Road Imp. Dist.* v. *St. Louis-Southwestern Ry. Co.* 257 U. S. 547, 560.

In *Auditor of State* v. *A. T. & S. F. R. R.* 6 Kan. 500, 507, the court said:

> "The raising of money for the support of government is essentially a legislative function. Where the money is raised by taxation, an ascertainment of the value of the property is a necessary prerequisite, and therefore an incident to the power to tax."

This case is cited in Cooley on Taxaton, 3rd Ed. p. 47, with *Hutchinson* v. *City of Omaha*, 52 Neb. 345. To the same effect are *Musser* v. *Adair*, 55 Ohio St. 466, and *Auditor General* v. *Pullman P. C. Co.* 34 Mich. 59, Cooley, J.

We take it as settled that the "valuation of property for the just distribution of taxes or assessments, is purely administrative in character." (*Upshur County* v. *Rich*, *supra*.)

Art. V. Sec. 1, of the Nebraska Constitution provides:

> "The judicial power of the state shall be vested in a supreme court, district courts, county courts, justices of the peace, and such other courts inferior to the Supreme Court as may be created by law; but other courts may be substituted by law for justices

of the peace within such districts, and with such additional civil and criminal jurisdiction as may be provided by law."

The Nebraska Constitution, Art. VIII, Sec. 1, provides:

> "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property. Taxes, other than property taxes, may be authorized by law. Existing revenue laws shall continue in effect until changed by the legislature."

The Nebraska Supreme Court has held that the power of taxation is committed to the legislature, by the Nebraska Constitution (*Board of Directors of Alfalfa I. D.* v. *Collins*, 46 Neb. 411, 64 N. W. 1086; *State ex rel, Atchinson & Neb. R. R.* v. *Board of County Commissioners*, 4 Neb. 537; *Hutchinson* v. *City of Omaha*, 52 Neb. 345, 72 N. W. 218; *State ex rel. Spelts* v. *Rowe*, 108 Neb. 232, 188 N. W. 107, 108.)

THE NEBRASKA CONSTITUTION FORBIDS THE EXERCISE OF OTHER THAN JUDICIAL FUNCTIONS BY THE NEBRASKA SUPREME COURT.

Art. II, Sec. 1 of the Nebraska Constitution provides:

> "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others except as hereinafter expressly directed or permitted." (Constitution of Nebraska 1875 (as amended 1920), Article II, Section 1.)

The Supreme Court of Nebraska frequently has pointed out that, under the state constitution, the court cannot be vested by the legislature with anything but ju-

dicial functions. (*Dodge County* v. *Acom et al.* 61 Neb. 376, 85 N. W. 292; *State ex rel. Thompson* v. *Neble,* 82 Neb. 267, 117 N. W. 723; *State ex rel. Wright* v. *Savage,* 64 Neb. 684, 90 N. W. 898. *Winkler* v. *City of Hastings,* 85 Neb. 212, 122 N. W. 858, 860; *Tyson* v. *Washington County,* 78 Neb. 211, 110 N. W. 634; *Hooper Telephone Co.* v. *Nebraska Telephone Co.* 96 Neb. 245, 147 N. W. 674.)

In the last case the Nebraska court several times referred to and quoted from, *Prentis* v. *Atlantic Coast Line Co.* 211 U. S. 210, calling attention to the fact that in the Prentis case it appeared the Supreme Court of Virginia had been given *legislative power* in reviewing and passing upon actions of the State Corporation Commission, so that *legislation was not complete* until the court had acted, while the Nebraska court had no legislative power and the Nebraska constitution forbids conferring legislative power upon the courts.

THE WRIT OF ERROR FROM THE STATE BOARD TO THE STATE SUPREME COURT CAN PROVIDE ONLY A JUDICIAL REVIEW.

It is not contended by the state in this case that the Supreme Court of Nebraska had power to reassess the properties of the railroad companies on such writ.

While the State Board acts in a quasi-judicial capacity, it is an agency of the legislature to which has been delegated the legislative function of taxation under the Constitution. The Supreme Court of Nebraska has said it will not usurp the functions of the tribunals created by law for ascertaining the fair cash value of property for taxation and will not constitute itself a taxing board or board of equalization. (*Woods* v. *Lincoln Gas & E. Co.* 74 Neb. 526; 104 N. W. 931.) The Supreme Court of Nebraska has held that it is not within the province of the court to

review the assessment made by the State Board and raise or lower it as equity and good conscience might seem to require; that the court can only determine whether the board has proceeded in a regular manner and if so, cannot direct further action even though it may disagree with the conclusion reached. (*State ex rel. Bee Building* v. *Savage*, 65 Neb. 714, 91 N. W. 716.)

Applying the test made by this court in *Keller et al.* v. *Potomac Electric Power Co. et al.* 261 U. S. 428, the Supreme Court of Nebraska, under the Nebraska Constitution, has no power to review the exercise of discretion by the State Board, to raise or lower valuations or to make the order which the board should have made. Any review by the Supreme Court of Nebraska is purely judicial.

Therefore, there was no occasion for the federal court to withhold relief, as in *Prentis* v. *Atlantic Coast Line Co.* 211 U. S. 210, because the final administrative action of the state had not been taken. In this case the judicial stage had been reached and, as in *Bacon* v. *Rutland R. R. Co.* 232 U. S. 134, the railroad was free to assert its rights in the federal courts.

In *Bacon* v. *Rutland Railroad Company, supra,* it was pointed out by Justice Holmes, page 236, that on behalf of the Vermont Commission a motion was made to dismiss the bill on the ground that until appellee had taken the appeal to the Supreme Court of the state, provided by the Vermont statutes, it ought not to be heard to complain elsewhere. This court disposed of the contention by determining that the appeal provided by the Vermont statute was purely judicial, as distinguished from an administrative review, and that the railroad had a right to resort to the United States District Court. Recently this court has applied the principal of the Rutland Railroad case in *Prendergast et al* v. *New York Telephone Com-*

pany, 263 U. S. 43, and it was applied in *City Ry. Co.* v. *Beard*, 283 Fed. 313, 325, an injunction against discriminatory tax assessments.

In this case it is the theory of appellees that the federal courts would not act until the state statutory procedure had been followed to a conclusion. If so, the federal courts never could grant preventive relief in this case, because when the state stautory procedure had been followed to a conclusion there would be an adjudication of a judicial controversy. Such a situation arose in *Detroit & Mackinac Ry.* v. *Michigan Railroad Commission*, 235 U. S. 402. After an appeal to the state court from an order of the Commission, the railroad company filed a bill for injunction in the federal court. This court pointed out that the Michigan Constitution separates legislative, executive and judicial powers, giving only the last to the courts, just as the Nebraska Constitution does. Distinguishing the Prentis case, this court held that the review of the order of the Commision authorized by the Michigan statute was judicial, the judgment on such a review *res judicata*, and the subsequent action in the Federal District Court concluded thereby.

In this case the assessment of appellant's property by the State Board was final; the judicial stage had been reached. The provision for writ of error to the Supreme Court of Nebraska could provide no more than a judicial review. There being diversity of citizenship and requisite amount in controversy, appellant was entitled to assert its rights in the District Court of the United States. There was no occasion for the Federal Court to withhold action on grounds of comity.

II.

This is a case in equity between citizens of different states. Appellant's right, under the Constitution and laws of the United States, to invoke the equity jurisdiction of the Federal Court, cannot be impaired by state statutes providing judicial remedies in state courts.

The petition and evidence show deliberate overassessment of appellant's property by the State Board and intentional and systematic undervaluation of all other property by the local assessors and county boards, an illegal discrimination in violation of appellant's right to the equal protection of the laws, guaranteed by the Fourteenth Amendment, and in violation of the rule of equality in taxation prescribed by the Constitution and laws of Nebraska.

In *Greene* v. *Louisville & Interurban R. R. Co.* 244 U. S. 499, at page 508, this court held that such a claim "presents without question a real and substantial controversy under the Constitution of the United States." In *Raymond* v. *Chicago Union Traction Company,* 207 U. S. 20, at p. 36, this court said that in such a case "federal jurisdiction will arise because of the equal protection of the laws guaranteed by the Fourteenth Amendment." Where the jurisdiction of the courts of the United States is properly invoked, they may afford equitable relief against discriminatory state taxation which contravenes the principle of equality prescribed by the organic law and statutes of a state. (*Cummings* v. *National Bank,* 101 U. S. 153, 157; *Greene* v. *Louisville & Interurban Railroad Co.* 244 U. S. 499, 514; *Taylor* v. *Louisville & Nashville R. Co.* 88 Fed. 350.)

In the case at bar there is diversity of citizenship and requisite amount in controversy. The case made de-

mands preventive relief, to avoid multiplicity of suits, clouds on title and irreparable injury.

Without passing upon appellant's claim of intentional and systematical discrimination in taxation, the two judges denied the application for an interlocutory injunction solely upon the ground that appellant had an adequate remedy at law under the statutes of the State of Nebraska in prosecuting error proceedings to the State Supreme Court.

This decision of the two judges sitting in the District Court conflicts with the fundamental principle that the equity jurisdiction of the District Court of the United States over judicial controversies between citizens of different states is derived from the Constitution and Acts of Congress in conformity therewith and cannot be ousted by remedies at law in state courts.

> "The Constitution provides that the judicial power of the United States shall extend to all cases in equity arising between the citizens of different states." (*Neves et al.* v. *Scott et al.* 13 How. 267, 271.)

By Sec. 24 Judicial Code, Congress has duly conferred this power on the District Courts.

In *United States* v. *Howland*, 4 Wheat. 108, objection was made to a bill in equity because an adequate remedy at law was afforded by a statute of Massachusetts. Chief Justice Marshall said (p. 114):

> "As the courts of the Union had a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other states."

In *Payne* v. *Hook*, 7 Wall. 425, at p. 430, the court said:

> "We have repeatedly held 'that the jurisdiction of the courts of the United States over controver-

sies between citizens of different states cannot be impaired by the laws of states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of states, and the practice of their courts, it is not so with equitable. *The equity jurisdiction conferred on the federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union.*" (Italics ours.)

In *Borer* v. *Chapman*, 119 U. S. 587, at p. 600, this court said:

"As a part of the ancient and original jurisdiction of courts of equity, it is vested, by the Constitution of the United States and the laws of Congress in pursuance thereof, in the federal courts, to be administered by the circuit courts in controversies arising between citizens of different states. It is the familiar and well settled doctrine of this court that this jurisdiction is independent of that conferred by the states upon their own courts, *and cannot be affected by any legislation except that of the United States.*" (Italics ours.)

In *Kirby* v. *Lake Shore & Mich. So. R. R.* 120 U. S. 130, this court said, p. 137:

"While the courts of the Union are required by the statutes creating them to accept as rules of decision, in trials at common law, the laws of the several states, except where the Constitution, laws, treaties and statutes of the United States otherwise provide, *their jurisdiction in equity cannot be impaired by the local statutes of the different states in which they sit.* In *United States* v. *Howland*, 4 Wheat. 108, 115, Chief Justice Marshall, speaking for the court, said, that, as the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction must be the same in all the states. The same view was expressed by Mr. Justice Curtis in his work on the jurisdiction of the courts in the United States

(p. 13), when he observed that 'the equity practice of the courts of the United States is the same everywhere in the United States, and they administer the same system of equity rules and equity jurisdiction throughout the whole of the United States *without regard to state laws.*'" (Italics ours.)

In *McConihay* v. *Wright*, 121 U. S. 201, 205, the court said:

"The contention of appellants, however, is that by the statute of West Virginia the omplainant might have maintained an action of ejectment. Reference is made in support of this contention to the West Virginia Code of 1868, c. 90, to show that an action of ejectment in that state will lie against one claiming title to or interest in lands, although not in possession. Admitting this to be so, it nevertheless, cannot have the effect to oust the jurisdiction in equity of courts of the United States as previously established. That jurisdiction, as has often been decided, is vested, as a part of the judicial powers of the United States, in its courts by the Constitution and acts of Congress in execution thereof. Without the assent of Congress that jurisdiction cannot be impaired or diminished by the statutes of the several states regulating the practice of their own courts. *Bills quia timet, such as the present, belong to the ancient jurisdiction in equity, and no change in state legislation giving, in like cases, a remedy by action at law, can, of itself, curtail the jurisdiction in equity of the courts of the United States. The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the Judiciary act of* 1789 *was adopted, unless subsequently changed by act of Congress.*" (Italics ours.)

In *Arrowsmith* v. *Gleason*, 129 U. S. 86, at p. 98, this court said:

"But it is insisted that the Circuit Court of the United States, sitting in Ohio, is without jurisdiction to make such a decree as is specifically prayed for, namely, a decree setting aside and vacating the orders of the Probate Court of Defiance County. If by this is meant only that the Circuit Court can-

not by its orders act directly upon the Probate Court, or that the Circuit Court cannot compel or require the Probate Court to set aside or vacate its own orders, the position of the defendants could not be disputed. But it does not follow that the right of Harmening, in his lifetime, or of his heirs since his death, to hold these lands, as against the plaintiff, cannot be questioned in a court of general equitable jurisdiction upon the ground of fraud. If the case made by the bill is clearly established by proof, it may be assumed that some state court, of superior jurisdiction and equity powers, and having before it all the parties interested, might afford the plaintiff relief of a substantial character. But whether that be so or not, it is difficult to perceive why the Circuit Court is not bound to give relief according to the recognized rules of equity, as administered in the courts of the United States, the plaintiff being a citizen of Nevada, the defendants citizens of Ohio, and the value of the matter in dispute, exclusive of interest and costs, being in excess of the amount required for the original jurisdiction of such courts.

A leading case upon this point is *Payne* v. *Hook*, 7 Wall. 425, 430. That was a suit, in the Circuit Court of the United States for Missouri, by a citizen of Virginia, against a public administrator, to obtain a distributive share of an estate then under administration in a court of Missouri. It was objected that the complainant, if a citizen of Missouri, could obtain redress only through the local Probate Court, and that she had no better or different rights by reason of being a citizen of Virginia. But this court, observing that the constitutional right of the citizen of one state to sue a citizen of another state in the courts of the United States, instead of resorting to a state tribunal, would be worth nothing, if the court in which the suit is instituted could not proceed to judgment and afford a suitable measure of redress, said:

'We have repeatedly held "that the jurisdiction of the courts of the United States over controversies between citizens of different states, cannot be impaired by the laws of the states which prescribe

the modes of redress in their courts, or which regulate the distribution of their judicial power.' "

In this case equity jurisdiction is invoked to obtain relief against *fraud*—systematic and intentional discrimination in tax assessment—which is one recognized ground for equitable interference in such cases, (*Green* v. *Louisville & Interurban R. R. Co.* 244 U. S. 499, 517-8; *Taylor* v. *Louisville & Nashville R. Co.* 88 Fed. 350; *Cummings* v. *National Bank*, 101 U. S. 153), and one reason why review by appeal or error from the body charged with the fraud, is inadequate. (*Taylor* v. *Louisville & Nashville R. Co.* 88 Fed. 350, 359; *Wilson et al.* v. *Illinois Southern Ry. Co.* January 14, 1924, No. 131, October Term, 1923, U. S. Supreme Court; 44 Sup. Ct. 203, 204.)

In *Mississippi Mills* v. *Cohen*, 150 U. S. 202, the United States Circuit Court had denied jurisdiction in equity because a statute of the State of Louisiana afforded an adequate remedy at law. This court reversed the case on the ground that the jurisdiction of federal courts sitting as courts of equity cannot be enlarged or diminished by state legislation.

In *Smyth* v. *Ames*, 169 U. S. 466, at p. 516, this court said:

> "We cannot accept this view of the equity jurisdiction of the circuit courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a federal court, *is not to be conclusively determined by the statutes of the particular state in which suit may be brought.* One who is entitled to sue in the federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of

> action. * * * But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper circuit court of the United States whenever jurisdiction attaches by reason of diverse citizenship, or upon any other ground of federal jurisdiction. *Payne* v. *Hook*, 7 Wall. 425, 430; *McConihay* v. *Wright*, 121 U. S. 201, 205." (Italics ours.)

In *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481, at p. 486, referring to decisions of the Colorado court on the statutory remedy, this court said:

> "We refer to these cases, not as defining the jurisdiction in equity of the Circuit Court, *for that they could not do* (*Payne* v. *Hook*, 7 Wall. 425, 430; *Whitehead* v. *Shattuck*, 138 U. S. 146; *Smyth* v. *Ames*, 169 U. S. 466, 516), but as showing that the Colorado statute gave to one who should pay illegal taxes a right to recover back from the county the money so paid. *This right was one which could be enforced by an action at law in the Circuit Court*, no less than in the state courts, if the elements of federal jurisdiction, such as diverse citizenship and the requisite amount in controversy, were present. *Ex Parte McNiel*, 13 Wall. 236, 243; *United States Mining Co.* v. *Lawson*, 134 Fed. Rep. 769, 771." (Italics ours.)

Other decisions of this Court holding that the constitutional right to invoke the equity jurisdiction of the courts of the United States, on the ground of diversity of citizenship, cannot be denied because of a remedy at law in a state court:

Barber v. *Barber*, 21 How. 582, 590-91.
Johnson v. *Waters*, 111 U. S. 640, 667.
Ridings v. *Johnson*, 128 U. S. 212, 217.
Smith v. *Reeves*, 178 U. S. 436, 444.
Waterman v. *Canal-Louisiana Bank Co.* 215 U. S. 33, 43.
McClellan v. *Carland*, 217 U. S. 268, 281.

In *Borden's Condensed Milk Co.* v. *Baker,* 177 Fed. 906, the Circuit Court of Appeals, Third Circuit, stated, p. 911:

> "The test is always whether the remedy under examination is available in the Federal Courts. If it is not, its existence does not affect the equitable jurisdiction of the Circuit Court. As we understand the decisions, these rules have been applied from the beginning of the Federal jurisdiction, and have not been departed from in any authoritative decision." (Citing cases.)

The following are some of the many cases in the lower Federal courts which support this statement:

Bean v. *Smith et al.* 2 Fed. Cas. No. 1174, p. 1150 (Justice Story, sitting in the Circuit Court, District Rhode Island).

Cropper et al. v. *Coburn et al.* 6 Fed. Cas. No. 3416, p. 871 (Justice Curtis, sitting in the Circuit Court, District of Massachusetts).

Breeden v. *Lee et al.* 4 Fed. Cas. No. 1828, p. 51 (District Judge Hughes).

Gordon et al. v. *Hobart et al.* 10 Fed. Cas. No. 5609, p. 797 (Justice Story, sitting in the Circuit Court, District of Maine).

Mayer v. *Foulkrod et al.* 16 Fed. Cas. No. 9341, p. 1234 (Justice Washington, sitting in the Circuit Court, Eastern District of Pennsylvania).

Kimball v. *Mobile,* 14 Fed. Cas. No. 7744, p. 492 (Circuit Judge Woods, Circuit Court, Southern District of Alabama).

Parsons et al. v. *Lyman et al.* 18 Fed. Cas. No. 10780, p. 1263 (District Judge Shipman).

Pratt et al. v. *Northam et al.* 19 Fed. Cas. No. 11376, p. 1255 (Justice Story, sitting in Circuit Court, District of Rhode Island).

Frazer & Chalmers v. *Colorado Dressing & Smelting Co.* 5 Fed. 163, District Judge Hallett, Circuit Court, District Colorado.

Pulliam v. *Pulliam*, 10 Fed. 23, District Judge Hammond, Circuit Court, Western District Tennessee.

Pittsburg C. & St. L. R. Co. v. *Keokuk & Hamilton Bridge Co.* 68 Fed. 19, Circuit Judge Jenkins, Circuit Court of Appeals, Seventh Circuit.

Ray v. *Tatum*, 72 Fed. 112, Circuit Judge McCormick, Circuit Court of Appeals, Fifth Circuit.

First National Bank of Chicago v. *Steinway et al.* 77 Fed. 661, Circuit Judge Acheson, Circuit Court, Western District of Pennsylvania.

Railroad & Telephone Companies v. *Board of Equalizers*, 85 Fed. 302, 318, District Judge Clark, Circuit Court, Md. District Tennessee.

Pokegama Sugar Pine Lumber Co. v. *Klamath River Lumber & Improvement Co.* 96 Fed. 34, Circuit Judge Morrow, Circuit Court Northern District California.

United States Life Insurance Co. v. *Cable*, 98 Fed. 761, District Judge Bunn, Circuit Court of Appeals, Seventh Circuit.

Sowles v. *First National Bank of Plattsburg et al.* 100 Fed. 552, District Judge Wheeler, Circuit Court District of Vermont.

Schmidt v. *West*, 104 Fed. 272, District Judge Baker, Circuit Court, District of Indiana.

Niagara Fire Insurance Co. et al. v. *Cornell*, 110 Fed, 816, District Judge McPherson, Circuit Court, District of Nebraska.

Peck et al. v. *Ayers & Lord Tie Co.* 116 Fed. 273, Circuit Judge Severns (with Judges Lurton and Day), Circuit Court of Appeals, Sixth Circuit.

Barrett v. *Twin City Power Co. et al.* 118 Fed. 861. Circuit Judge Simonton, Circuit Court, District South Dakota. Affirmed *Twin City Power Co.* v. *Barrett*, 126 Fed. 302, District Judge Keller, Circuit Court of Appeals, Fourth Circuit.

National Surety Co. v. *State Bank*, 120 Fed. 593, Circuit Judge Sanborn, Circuit Court of Appeals, Eighth Circuit.

Jones v. *Mutual Fidelity Co.* 123 Fed. 506, 519, District Judge Bradford, Circuit Court, District of Delaware.

Brun et al. v. *Mann*, 151 Fed. 145, Circuit Judge Sanborn (with Judges Van Deventer and Phillips) Circuit Court of Appeals, Eighth Circuit.

Butler Bros. Shoe Co. v. *United States Rubber Co.* 156 Fed. 1, 18, Circuit Judge Sanborn (with Judges VanDeventer and Philips), Circuit Court of Appeals, Eighth Circuit. Certiorari denied 212 U. S. 577.

Spencer v. *Watkins*, 169 Fed. 379, 381, Circuit Judge Hook (with Judges VanDeventer and Adams), Circuit Court of Appeals, Eighth Circuit. Certiorari denied 215 U. S. 605.

Empire Circuit Co. v. *Sullivan*, 169 Fed. 1009, District Judge Martin, Circuit Court, Southern District, New York.

Western Union Telegraph Co. v. *Trapp*, 186 Fed. 114, 121, District Judge Riner (with Judges Adams and Munger), Circuit Court of Appeals, Eighth Circuit.

Richardson v. *Pennsylvania Coal Co.* 203 Fed. 743, 746, District Judge Witner, District Court Md., Pennsylvania.

Union Pacific Railroad Co. v. *Commissioners of Weld County,* 222 Fed. 651, 654, Circuit Judges Hook and Smith, and District Judge Amidon.

St. Louis-San Francisco Ry. Co. v. *McElvain,* 253 Fed. 123, 126.

Nevada California Power Co. v. *Hamilton,* 235 Fed. 317, 338, District Judge Farrington, District Court, District of Nevada.

Franklin et al. v. *Nevada California Power Co.* 264 Fed. 643, 645, Circuit Judge Ross (with Judges Gilbert and Hunt), Circuit Court of Appeals, Ninth Circuit.

Cleveland Cliffs Iron Co. v. *Village of Kinney,* 262 Fed. 980, 984, District Judge Booth, District Court, District of Minnesota.

C. & N. W. Ry. Co. v. *Railroad & Warehouse Commission of Minnesota,* 280 Fed. 387, 393, District Judge Booth, District Court, District of Minnesota.

Chicago R. I. & P. Ry. Co. v. *Risty,* 282 Fed. 364, 371, District Judge Elliott, District Court, District of South Dakota.

C. & N. W. Ry. v. *Evland,* 285 Fed. 425, 428, District Judge Elliott, District Court, District of South Dakota.

In the following text books the same rule is stated:

1 High on Injunctions, 4th Ed., Sec. 29, p. 47.

1 Foster Federal Practice, 6th Ed. Sec. 80, p. 565.

1 Pomeroy's Equity Jurisprudence, 4th Ed., Secs. 295-7, pp. 576-583.

21 Corpus Juris, Equity, Sec. 17 (2), pp. 42-4.
1 Street's Fed. Eq. Prac., p. 30, Secs. 45 and 47.
Simkins Fed. Eq. Suit (Rev. Ed.), p. 275.

Appellees are asking no less than outright repudiation of all the foregoing authorities and nullification of the constitutional and statutory provisions vesting in the courts of the United States jurisdiction over controversies between citizens of different states.

The reasons for conferring this jurisdiction on the courts of the United States are familiar. In *Marshall* v. *Baltimore and Ohio R. R. Co.* 16 Howard, 314, at 326, this court quoted, with approval, from Federalist No. 80, as follows:

> "It may be esteemed as the basis of the Union, 'that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of several states.' And if it be a just principle, that every government ought to possess the means of executing its own provisions by its own authority, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities, the national judiciary ought to preside in all cases, in which one state or its citizens are opposed to another state or its citizens."

This court then said:

> "Now, if this be a right, or privilege guaranteed by the Constitution to citizens of one state in their controversies with citizens of another, it is plain that it cannot be taken away from the plaintiff by any legislation of the state in which the defendant resides. * * * It was well remarked by Mr. Justice Catron, in his opinion delivered in the case of Rundle, already referred to, that 'if the United States courts could be ousted of jurisdiction, and citizens of other states be forced into the state courts, without the power of election, they would often be deprived, in great cases, of all benefit contemplated by the Constitution.' "

In *Hyde et al.* v. *Stone*, 20 Howard, 170, at p. 175, this court said:

> "But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. * * * But the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. (*Suydam* v. *Broadnax*, 14 Pet. 67; *Union Bank* v. *Jolly, Adm'r*, 18 How. 503.)"

Under the order of Judges Lewis and Munger in the case at bar, what becomes of the ancient rule, established in this court for a hundred years, that the remedy at law referred to in Sec. 267 of the Judicial Code as preventing the exercise of the equity jurisdiction of the federal courts, means only a remedy at law *in the federal court?*

What becomes of *Payne* v. *Hook* and the long line of similar decisions of this court, if appellant is to be turned away from a federal court of equity in this case? What becomes of the constitutional provision that the judicial powers of the United States shall extend to all cases in equity arising between citizens of different states?

The two judges in the District Court disregarded these authoritative decisions and looking to a confused and doubtful state statute, unconstrued by the state courts, discovered in it a supposed remedy. There is, and can be, no pretense that this fancied remedy was available in the federal court. Therefore, under the decisions of this court, it furnished no reason for withholding the relief to which appellant was plainly entitled.

The federal courts have shown a proper reluctance to

interfere unnecessarily in fiscal affairs of the state governments, but however important it may be that the State of Nebraska obtain necessary revenue, it is equally important that its officers proceed in a lawful manner and within the limitations prescribed by the federal constitution. The petition and evidence showed plain violation of rights guaranteed to appellant by the Fourteenth Amendment. Appellant is a citizen of Illinois. A sum of money far in excess of the requisite amount is in controversy. To prevent clouds upon its titles, multiplicity of suits and irreparable injury, appellant appealed to a federal court of equity to enjoin the state officers from violating the rights guaranteed appellant by the Fourteenth Amendment. Under the Constitution of the United States and the Judicial Code appellant is entitled to have its rights determined by a federal court of equity. The District Court erred in holding that the ancient chancery jurisdiction of the federal court was ousted by the state statute.

III.

The supposed remedy by writ of error to the Supreme Court of Nebraska, is, at best, inadequate, doubtful and uncertain.

The statute providing writ of error from the State Board to the Supreme Court of Nebraska was passed in 1921, and had not been construed by the Nebraska Court when the discriminatory assessment of appellant's property was made in 1922. At the time this suit was instituted, there were many reasons why the statutory writ of error did not appear to furnish a plain, adequate or complete remedy:

THERE WAS GRAVE DOUBT WHETHER THE WRIT OF ERROR WAS AVAILABLE TO APPELLANT.

While the State Board had considered the complaints of appellant and other railroad companies, there was nothing in the statutes which specifically authorized such procedure. The State Board performs two separate and distinct functions. It acts as a Board of *Assessment* at its May meeting and as a Board of *Equalization* at its July meeting. The July meeting is provided for in Sec. 5901, which gives the writ of error to the Supreme Court. By that section the Board is directed to equalize from the *abstracts* sent in by each county. The statute (Sec. 5977, App. 75) does not require that the abstracts include railroad property. Under a strict construction of the statute there was ground for claiming that the railroad assessment was not before the State Board at the equalization meeting. Also, Section 5901 authorizes the State Board to equalize "between counties" and "between classes and kinds of property in any county." This provision of the statute gave further basis for the argument that railroad property was not before the State Board for equalization purposes. In *Hacker* v. *Howe*, 72 Neb. 385, 101 N. W. 255, the Supreme Court held that the State Board did not deal with assessments of individual property owners and the statute seems to contemplate only an equalization between counties and between various classes of property within any county or tax district. The apportionment of the railroad assessments on an average valuation per mile in each county would make diffiicult any equalization thereof with other kinds or classes of property in any county or tax district, as the average mileage valuations are not comparable with the valuations of local property. Although the second sentence of Section 5901 uses the phrase "all

other property," same is so associated with the other words of the sentence that its construction might be subject to the rule of *ejusdem generis* (*Alabama* v. *Montague*, 117 U. S. 602) and restricted to property assessed for taxation in the several counties of the state.

The specification in Section 5901 that the State Board at its equalization meeting should consider the "railroads entirely within one county" was not without significance, because such railroads might be comparable with other property in the same county and the phrase might be held to exclude railroads in more than one county.

These considerations made it uncertain whether or not the assessment of appellant's property at the May meeting of the State Board might be held to be separate and distinct from the equalization proceedings of the State Board at the July meeting, so that if appellant prosecuted a writ of error to the Supreme Court under Section 5901 from the equalization order at the July meeting, it might be met with the contention that that statute did not provide any review of the assessment of railroad property at the May meeting.

The notice of hearing is required to be given only to the *counties*. Representatives of the *counties* are the only persons authorized to appear and object to increase or decrease of valuations. The statute does not provide that railroads, or other individual taxpayers, shall be notified, or permitted to appear, present evidence, preserve exceptions or prosecute error. The equalization by the State Board is not of a private, but of a public character. The words "any person, county or municipality affected thereby" may mean the county clerks, county assessors, members of the county boards, counties and municipalities,

as they are the individuals and governmental subdivisions notified and authorized to appear before the Board. Possibly the statute might be construed to include persons affected by an increase or decrease of valuation of any class of property *in any one county*, as railroads entirely within one county, which the statute requires the board to deal with. It is not clear that railroads like appellant are included.

For these reasons it was very doubtful whether appellant could take the writ of error mentioned in Section 5901.

Appellant filed with the State Board complaint against the assessment of its property and the State Board passed upon said complaint. However, there is nothing in the Nebraska statutes authorizing such procedure. Appellant was bound to expect that in construing Section 5901, the court would give appellant no greater right to writ of error than the court found the legislature had provided. If the writ of error was not available to appellant under the statute, it is obvious that by filing an unauthorized complaint with the State Board, appellant could not draw itself into the equalization proceedings of the board so as to be entitled to a writ of error therefrom.

FROM THE PRIOR DECISIONS OF THE SUPREME COURT OF NEBRASKA IT APPEARED THAT THE REMEDY BY WRIT OF ERROR WOULD NOT BE ADEQUATE.

The statute makes no provision for the practice to be followed on such a writ of error or the power of the Supreme Court to grant relief. It is not to be assumed that the Supreme Court would have any different power on this new writ of error than it has on other similar proceedings under the general practice in the State.

Woods v. *Lincoln Gas & Electric Co.* 74 Neb. 526, 104

N. W. 931, was a proceeding in error in the Supreme Court of Nebraska to review the judgment of the District court affirming the action of a city council, acting as a board of equalization. The Supreme Court of Nebraska said, page 931 of 104 N. W.:

> "At the outset of the discussion we deem it advisable to say that *this court will not usurp the functions of the tribunals created by law for ascertaining the fair cash value of property for taxation, and will not constitute itself a taxing board or board of equalization.* It will examine the errors assigned in the proceedings of the District Court in the same manner and to the same extent as in other error proceedings, and the same presumptions will be applied as in other cases. If the evidence is sufficient to support the judgment of the inferior tribunal, it will not be disturbed, even though our view of its effect should differ from that of the board of equalization." (Italics ours.)

The last mentioned case was cited with approval by the Supreme Court of Nebraska in *Sioux City Bridge Co.* v. *Dakota County,* 105 Neb. 834, 182 N. W. 485, March 25, 1921.

The Supreme Court of Nebraska has held that to warrant a reversal on writ of error it must affirmatively appear in the record that errors have been committed and the rights of the complaining party prejudiced (*Andrews* v. *Kerr,* 54 Neb. 618, 74 N. W. 1071); that error in the proceedings will not be presumed, but must be affirmatively shown (*Ashpole* v. *Hallgren,* 60 Neb. 196, 82 N. W. 623); and that original evidence cannot be received to alter, contradict or avoid the record (*MacDonald* v. *Bowman,* 40 Neb. 269, 58 N. W. 704).

In *State ex rel* v. *State Board of Equalization and Assessment,* 81 Neb. 139, 115 N. W. 789, an action for mandamus to compel the State Board to make a record of special findings with reference to as-

sessment of the property of the Union Pacific Railroad and to show what allowance was made for the fact that all other property in the state had been valued for taxation at less than its actual value, the Supreme Court of Nebraska said that the State Board had original and exclusive jurisdiction of valuation and assessment of railroads and was given wide discretion in the exercise of its powers and duties in that behalf. At p. 146 (115 N. W. p. 792) the court said:

> "There is no provision of the statutes requiring the respondent board to keep a record of its interlocutory rulings, or the reasons, therefor during the progress of a hearing upon the valuation of the property of railroad corporations for the purpose of taxation. While the orderly transaction of its business may prompt the board to keep such a record of its rulings upon such matters for its own convenience, yet it is not an essential requirement for the proper performance of its duties. There is no doubt that all the steps required by the statute in making an assessment should be preserved as a matter of record, in order to evidence and perpetuate the fact that the board has acted within its jurisdiction; but, as above stated, such record need not contain its rulings upon interlocutory questions, and when it records the matters necessary to confer upon it the power to act, its general proceedings, and the final result of its deliberations fixing the value of properties, it has performed all that the law contemplates in that behalf.
>
> * * * As clearly pointed out in *State* v. *Savage, supra,* the field of review of the action of the taxing board is only a narrow one at best, and this renders it the more essential that due regard be paid to the rights of the taxpayer during its proceedings."

In the recent case of *Chicago & N. W. Ry. Co.* v. *City of Albion,* ..... Neb. ....., 192 N. W. 233 (February 27, 1923), the railroad had requested the city council, acting as a board of equalization of special assess-

ments, to make a record of the evidence upon which it relied to support the proposed benefits; the board refused to do so. Its refusal was preserved in a bill of exceptions and presented to the District Court on writ of error. The State Supreme Court held that although the board had refused to disclose the evidence on which the assessment was based and the only evidence in the bill of exceptions was that offered by the railroad company, nevertheless, the board would be considered as having acted upon information and knowledge of the property, and the assessment would not be held erroneous even though the record did not set forth the evidence upon which the board acted.

State ex rel. Bee Building Co. v. *Savage,* 65 Neb. 714, 91 N. W. 716, was an action for mandamus against the State Board of Equalization and Assessment to compel a reassessment of certain property. The Supreme Court of Nebraska said, p. 729 of 91 N. W.:

> "We can only inquire into the matter for the purpose of determining whether respondents, in assessing the properties which it was their duty to assess, have expressed an honest judgment as to the assessable values upon sufficient information, or whether the method pursued in ascertaining and fixing the value of the property assessed was in such wanton and reckless disregard of their duties as to warrant the conclusion that they acted fraudulently. *It is not within the province of this court to review the assessment made by the board, and to raise or lower it as equity and good conscience might seem to require. We can only determine whether the board has proceeded in a legal manner and, if so, we cannot direct further action, even though we may disagree with the conclusion reached,* or regard the method of procedure as not the most appropriate and best calculated to secure, with the greatest certainty and accuracy a true valuation of the property assessed. If they have acted by assessing all the property it is their duty under the law to assess, and

> have proceeded in such manner that it cannot be said they have acted fraudulently in that which they have done, the court is powerless to correct the error, even though it be conceded that the assessment as made is lower than in justice it should have been." (Italics ours.)

Section 5842 (Appendix, p. 71) authorizes the State Board to act upon its own knowledge in assessing railroad property, without the introduction of evidence, and in the absence of any requirement that it keep more of a record than is necessary to show that it proceeded in a regular manner, it would be hopeless for appellant to attempt to correct a discriminatory assessment by review of the record of the State Board on writ of error.

On such a writ the presumption would be that the State Board had respected appellant's right to equality in taxation. The record of the State Board would not show the discrimination against appellant. The Supreme Court could not consider matters *de hors the record.* The facts upon which appellant's claim for relief is based could only be made to appear by extrinsic evidence. Such a remedy is plainly inadequate. (*Taylor* v. *Louisville & Nashville R. Co.* 88 Fed. 350, 359; certiorari denied 172 U. S. 647.)

In Nebraska the assessment, levy and collection of taxes are not equitable proceedings, must necessarily be governed by rules which in many respects may be considered arbitrary and the taxing powers and taxpayers must comply with these rules (*Darr* v. *Dawson County,* 93 Neb. 93, 139 N. W. 852.)

In *Hacker* v. *Howe,* 72 Neb. 385, 101 N. W. 255, the equalization order of the State Board resulted in increasing the assessed valuation of *money* beyond the actual par value thereof, but the Nebraska Supreme Court held that such overassessment of one item of property would

not affect the *legality of the order of the board,* that body not being concerned with the property of individual taxpayers.

In *Lincoln Telephone & Telegraph Co.* v. *Johnson County,* 102 Neb. 254, 166 N. W. 627, the Supreme Court held that a board of equalization could not be required to reduce assessment on the full value of plaintiff's property, because all other property was assessed at but a fraction of its true value, and that the plaintiff's only remedy was to endeavor to induce the assessors to assess all other property at full value. This decision was approved and followed in *Sioux City Bridge Co.* v. *Dakota County,* 105 Neb. 834, 182 N. W. 485, decided by the Supreme Court of Nebraska, March 25, 1921. This court reversed the Sioux City Bridge Case, January 2, 1923, (260 U. S. 441). Appellant's petition in this case was filed December 18, 1922, and the application for an interlocutory injunction denied January 10, 1923. At the time appellant filed its petition it was confronted with a statement of the Supreme Court of Nebraska that the rule was settled in Nebraska that assessments at true value would not be reduced because other property was assessed at less than true value. Even if appellant had had any hope of securing a review of its assessment by writ of error, the established rule in Nebraska precluded relief from such discriminatory assessments.

From the opinion of Judge Lewis it is obvious that he realized that the Nebraska Supreme Court has no authority to reduce assessments.

Judge Lewis said (Tr., 194):

> "We cannot assume that the State Board of Equalization would not have followed the opinion of the Supreme Court if it had found that there was an unequal adjustment of taxes on account of farm lands being assessed too low and the railroads too high, as is complained of here. * * * We must as-

> sume that the State Board of Equalization would have abided by the conclusions of the Supreme Court and have corrected the errors now complained of."

This statement shows the inefficacy and uncertainty of the supposed remedy. Judge Lewis did not suggest by what method of procedure the case would go back to the State Board, how the State Board could reconvene after the expiration of the statutory period of its meeting, how it could reassess appellant's property without statutory authority, or how the board could be caused to comply with the conclusions of the Supreme Court. Conceding that the correction of the erroneous assessment could not be made by the Supreme Court, nevertheless the District Court surrendered its equity jurisdiction because of a state statute which offered no more definite relief than an assumption that in some unknown manner a taxpayer might procure for itself the equal protection of the law, theretofore denied it.

Has a federal court of equity no better protection for substantial, constitutional rights?

THE WRIT OF ERROR DOES NOT OPERATE AS A SUPERSEDEAS OR PREVENT COLLECTION OF TAXES OR LIENS ON PROPERTY.

The Nebraska Supreme Court frequently has held that a writ of error or appeal, in other than capital cases, does not operate as a supersedeas and that a supersedeas can be had, as a matter of right, only where it is affirmatively provided by statute. In *Home Fire Insurance Co.* v. *Dutcher et al.* 48 Neb. 755, 67 N. W. 766, p. 767, the Nebraska court said:

> "A supersedeas is now almost everywhere so much controlled by statute, and the statutes are so different in their provisions, that but little assistance can be had from the adjudications of other states. After a severe struggle it became estab-

lished in England that an appeal of itself operated as a supersedeas. Following the analogy of this practice, it is held in some states that statutes providing special conditions, such as the giving of a bond, in order to affect a supersedeas, are merely restrictive in their character, and that the appeal itself works a supersedeas where there is no statute requiring a bond or a compliance with other conditions. A different doctrine has, however, been announced in this state; and it must be accepted as the established rule here that a supersedeas can be had, as a matter of right, only where it is affirmatively provided for by statute. *Gandy* v. *State*, 10 Neb. 243, 4 N. W. 1019; *State* v. *Judges of District Court*, 19 Neb. 149, 26 N. W. 723; *State* v. *Meeker*, 19 Neb. 444, 27 N. W. 427; *Cooperrider* v. *State*, 46 Neb. 84, 64 N. W. 372."

There is nothing in Sec. 5901 or any other Nebraska statute with reference to error proceedings from the order of the State Board of Equalization and Assessment which provides that such error proceedings shall operate as a supersedeas or gives the taxpayer the right to a supersedeas on such proceedings. Section 5975 (Appendix, p. 74), provides an appeal from actions of the County Board of Equalization to the District Court. That statute has no application to the assessment of railroad property by the State Board of Equalization, but its provisions with reference to staying the collection of taxes illustrate the policy of the Nebraska law. It provides:

> "No appeal shall in any manner suspend the collection of any tax or the duties of officers relating thereto, during the pendency of the same, and all taxes affected thereby, which may be collected, shall be kept by the treasurer in a special fund without distribution."

There is nothing in the Nebraska statutes which makes the writ of error from the State Board a supersedeas or which gives a railroad the right to have the levy and

collection of the taxes suspended pending the hearing of such a writ of error.

How can it be said that a remedy at law is adequate so as to make unnecessary preventive relief in equity when there is nothing in the legal remedy which gives the complaining party a right to stay the action complained of?

As heretofore pointed out, the tax levies are entered on the tax lists and Section 5984 (Appendix, p. 78), requires that the tax lists be delivered to the county treasurers with an attached warrant, signed and sealed by the county clerk, commanding the treasurer to collect the taxes, by seizure and sale of property under distress warrants (Secs. 6011 and 6015 App., p. 78), or by demanding of any railroad agent in the county such money as may come into his hands, under penalty on the agent for failure to comply. (Sec. 6017, App., p. 79.) Therefore, under the statutes of Nebraska, by an uninterrupted succession of statutory steps on the part of the State Board, County Boards, county clerks and county treasurers it became the mandatory duty of the county treasurers to collect taxes assessed against appellant on the discriminatory valuation. A writ of error from the State Board to the Supreme Court would not relieve those officers of their duty under the statute to proceed with the collection of the taxes and therefore would furnish no remedy.

THIS DOUBTFUL STATUTE DOES NOT CONSTITUTE A PLAIN, ADEQUATE AND COMPLETE REMEDY JUSTIFYING REFUSAL OF EQUITABLE RELIEF.

The statute is not clear as to who may prosecute the writ or what acts of the board are subject to such review. The statute is silent as to the practice to be followed on such writ of error and as to the power of the

Supreme Court to grant relief. The court could do no more than examine the record of the proceedings of the State Board for errors of law. The court had held that tax boards need not make a record of the evidence on which they act and the statute authorizes the State Board to act on its own knowledge. There is no statutory procedure by which the facts showing discrimination in assessment by the State Board might be preserved for review on writ of error. The Supreme Court of Nebraska has no tax assessing powers. There is no provision in the statutes for reassessment of railroad property by the State Board. It is conjectural as to how the State Board might be compelled to abide by the conclusions of the Supreme Court. The Supreme Court of Nebraska had not construed the statute in question. There was no case in Nebraska under any other statute where the Supreme Court had reviewed a decision of the State Board or corrected a discriminatory assessment by the State Board.

It was contrary to the repeated decisions of this court to turn appellant away from a federal court of equity solely upon the supposition that by carrying on pioneer litigation for the construction of a new statute appellant could have been able to obtain the relief to which it plainly was entitled. In *Atlantic Coast Line Railroad Co.* v. *Daughton*, 262 U. S. 413, at p. 426, this court said:

> "But the statute mainly relied upon is a recent one which appears not to have been construed and applied by the highest court of the state. In the absence of such decision, we cannot say that the remedy at law is plain and adequate; *Dawson* v. *Kentucky Distilleries & Warehouse Co.* 255 U. S. 288, 296; *Wallace* v. *Hines*, 253 U. S. 66, 68; *Shaffer* v. *Carter*, 252 U. S. 37, 47; *Union Pacific R. R. Co.* v. *Weld County*, 247 U. S. 282; *Davis* v. *Wakelee*, 156 U. S. 680, 688."

THE DECISIONS IN SIOUX CITY BRIDGE COMPANY VS DAKOTA COUNTY, 260 U. S. 441, AND CHICAGO, ROCK ISLAND AND PACIFIC RY. CO. VS. STATE (SUPREME COURT OF NEBRASKA, DECEMBER 31, 1923, UNREPORTED) HAVE NOT REMOVED THE DOUBT AND UNCERTAINTY AS TO THE REMEDY BY WRIT OF ERROR.

As hereinabove pointed out, this court reversed the decision of the Nebraska court in the *Sioux City Bridge* case January 2, 1923 (260 U. S. 441), after this suit had been instituted and heard in the court below.

Upon reversal of the Sioux City Bridge case the Nebraska Supreme Court rendered a further decision (_____ Neb. _____, 194 N. W. 729, July 9, 1923, remanding the case to the trial court to try the case on the merits. However, the Sioux City bridge litigation is not determinative of a proceeding by writ of error from the State Board to the state Supreme Court.

In the Sioux City Bridge case plaintiff *appealed* from the County Board of Equalization to the District Court and took further *appeal* to the State Supreme Court, under the provision of Section 5975 (Appendix, p. 74), which gives the right to such an appeal from the County Board, with provision that "*the court shall hear and determine anew all questions raised before the County Board which relate to the liability of the property to assessment, or the amount thereof*" and a further right of appeal to the Supreme Court. Appellant's property is excluded by statute from consideration by the County Board (Sec. 5972, Appendix, p. 73) and there is no such appeal provided by statute from the assessment of appellant's railroad property by the State Board. The narrow writ of error from the State Board, which is the only remedy claimed to have been open to appellant, would not permit examination of the question of the amount of the assessment. If the Sioux City

Bridge Company could not obtain relief from the Supreme Court of Nebraska on an appeal where the courts were directed to hear and determine *anew* all questions relating to the amount of an assessment, appellant had no prospect of obtaining relief on the narrow writ of error to which, at best, it was limited.

The Nebraska statute authorizing the successive appeals by the Sioux City Bridge Company, with trials *de novo* in the courts, made it possible for the Bridge Company to present to this court the question of intentional and arbitrary discrimination in assessment. Such a question could not be raised or passed upon in the Supreme Court of Nebraska on writ of error to the State Board, and appellant could not bring to this court a record presenting the question for review. Furthermore, this court took the Sioux City Bridge case on certiorari, which is not a writ of right. For these reasons the Sioux City Bridge case furnishes no criterion.

This court there held (260 U. S. 441, p. 446) that a taxpayer aggrieved by intentional discrimination in assessment is entitled to have his assessment reduced to the common level of other property. On writ of error to the State Board the Supreme Court of Nebraska could not have reduced the amount of appellant's assessment; it could have done no more than examine the record to determine whether the proceedings of the State Board were regular on their face. In holding that the writ of error was an adequate remedy in this case, the lower court has ascribed to the Supreme Court of Nebraska the very powers of tax assessment and equalization which that court has said it does not possess and will not usurp. (*Woods* v. *Lincoln G. & E. Co.* 74 Neb. 526, 104 N. W. 931.)

Long after the commencement of this suit and after the denial of an interlocutory injunction herein, The Chi-

cago, Rock Island and Pacific Railway Company took a writ of error to the Supreme Court of Nebraska, under Section 5901, from the 1923 assessment of its property by the State Board. In that case the railroad claimed such assessment was discriminatory because of over-valuation of its property and undervaluation of other property. December 31, 1923, a year after this case had been decided in the Federal District Court and long after this appeal had been docketed in this court, the Supreme Court of Nebraska rendered a decision in the Rock Island case (not yet reported) setting aside the assessment of the property of that railroad for 1923 taxes.

An examination of the opinion in that case discloses that the questions as to the application of the writ of error to the *assessment* of railroad property at the May meeting of the board, as distinguished from *equalization* of other property at the July meeting, the scope of review on writ of error, the procedure for remanding such a cause to the State Board and reassessment by the State Board, could not have been presented or argued. It hardly seems possible that the Nebraska court would have rendered such a decision, without making any reference to its former opinions and the statutes, if its attention had been directed thereto. Of course, the amount involved in the Rock Island case was relatively small; the valuation complained of was but little over $10,000,000 (Appellees' brief, p. 25) while the valuation complained of here is over $137,000,000. Obviously the question of the construction of the 1921 statute in that case did not give the Attorney General of Nebraska so much concern as it does in this case.

Even in the absence of any apparent contest as to the construction of the statute, the decision in the Rock Island case does not settle the uncertainties of Sec-

tion 5901. The court set aside the assessment and remanded the proceeding to the State Board, but the court itself was in doubt as to how the State Board might proceed to reassess the property. There is nothing in the Nebraska statutes which authorizes the State Board, acting as a board of assessment, to reconvene after the expiration of the statutory period of its meeting or to reassess railroad property. In the last paragraph of the opinion the court suggests that the State Board might adopt the procedure provided in Section 5882 (Art. VI) which the court says "seems to be well adapted" although not specifically applicable. Obviously the attention of the Nebraska court was not directed to the fact that Section 5882 is a part of Article VI, the Terminal Tax Law, which provides a separate assessment of railroad property for purposes of *city and village taxation.* Note 1, p. 6.) The Rock Island case, like this case, involved only *state, county, town, school and road taxation.* City and village taxation was not involved. Section 5883 (Art. VI) provides:

> "Limitations of Article. This Article (VI) shall not apply to or in any manner affect, the assessment, equalization, levy or collection of any *state, county, township, school district or road district tax* * * *." (Appendix, p. 73.)

Thus the Legislature of Nebraska has specifically provided that Section 5882, for reassessment of terminal property for city and village taxation, shall not apply to or in any manner affect the assessment of property for state, county, township, school and road taxation, the only taxation involved in the Rock Island case.

In the Rock Island case the Supreme Court of Nebraska said:

> "We desire in this connection to call special attention to Section 5842, Comp. St. 1922, which gives the Board power to consider all facts and informa-

tion not contained in the reports made by the railroad companies."

Section 5842 (Appendix, p. 71) authorizes the State Board to find the value "from all the information it is able to obtain."

In the last sentence of the Rock Island opinion the court said:

> "Where such information is considered, the source from which it has been obtained should, so far as possible, be mentioned in the record, so that a reviewing court may consult the same sources and thus stand in the shoes of the assessing body."

Heretofore the Nebraska court has held that the State Board need keep no more record than is necessary to show that it acted within its jurisdiction.

> "When it (the State Board) records the matters necessary to confer upon it the power to act, its general proceeding and the final result of its deliberations fixing the value of properties, it has performed all that the law contemplates in that behalf." *State ex rel. Union Pacific R. Co.* v. *State Board of Equalization and Assessment,* 81 Neb. 139, 115 N. W. 789, 792.

Nothing in the Nebraska statutes requires the board to make any record of the information on which it acts.

The Supreme Court of Nebraska, confronted with the difficulty of reviewing on order of the States Board in a proceeding where the Nebraska statutes do not require the Board to make any record of the information on which it acts, was impelled to suggest to the Board that it should make more of a record than the law requires. This is a striking illustration of the inadequacy of the statutory remedy.

No doubt many of the surprising features of the Rock Island case are the result of the absence of any apparent contest as to the scope of review on such writ of error.

However, there was no doubt in the mind of the court that the remedy was purely judicial. The court said:

> "The statements of value contained in this opinion are only approximate, and not intended to limit or control the State Board if or when it becomes necessary to assess or reassess the value of a complainant's line of railroad in Nebraska."

This indicates that the court did not intend to interfere with administrative functions of the State Board, and recognized that the writ of error was a *judicial* review.

EQUITY JURISDICTION IS NOT LOST BECAUSE, SINCE THE FILING OF THE SUIT, A REMEDY AT LAW MAY HAVE BECOME AVAILABLE.

When appellant filed its petition in this case in 1922 there was nothing in the statutes or decisions in Nebraska which might lead any taxpayer to expect that the Supreme Court of the state, on writ of error might or could grant relief from fraudulent discrimination in tax assessment. When appellant's petition was filed in this case the Supreme Court of Nebraska had repeatedly declared that it would not usurp the functions of the tax assessing board, that it would not constitute itself a Board of Equalization; that it would not disturb an assessment even though its view of the evidence differed from that of the board (*Woods* v. *Lincoln Gas & Electric Co.* 74 Neb. 526, 104 N. W. 931); that it was not within the province of the court to review the assessment made by the State Board and raise or lower it as equity and good conscience might seem to require, (*State ex rel. Bee Building* v. *Savage*, 65 Neb. 714, 91 N. W. 716); that it would not interfere with an assessment on the ground that other property had been assessed at a lower percentage of value. There was nothing in the law of Nebraska or the decisions of

its courts which might lead any taxpayer to expect relief in those courts from the discriminatory assessment shown in this case. (*Sioux City Bridge Co.* v. *Dakota County,* 105 Neb. 834; 182 N. W. 485.)

Whatever may be the effect of the subsequent decisions of this court in *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 441, and of the Nebraska court in the Rock Island case, those decisions can have no bearing upon appellant's right to the relief prayed for, at the time the petition in this case was filed.

The statute in question had not been construed by the Supreme Court of Nebraska and the supposed remedy was, at best, doubtful and uncertain. Even if the decision in the Rock Island case removed the doubt and uncertainty as to the adequacy of the remedy by writ of error, such a decision, long after the filing of appellant's petition, would not defeat the equity jurisdiction of the federal court. In *Dawson* v. *Kentucky Distilleries Co.* 255 U. S. 288, it appeared that the legislature of Kentucky enacted a tax law in 1920. The Distilleries Company filed a petition in the federal court for an injunction restraining the enforcement of the law on the ground that it violated the State and Federal Constitutions. Three judges granted an interlocutory injunction and on direct appeal to this court the state contended that plaintiff had an adequate remedy at law, by recovery of the tax from the state officers. The right to recover back such taxes under the state law was uncertain when the injunction suit in the federal court was begun.

At p. 295, Justice Brandeis said:

> "It was not until November 16, 1920, which was after these appeals had been entered in this court, that *Craig* v. *Security Producing & Refining Co.* 189 Ky. 565, 568, settled that money paid under such circumstances could be recovered. * * * But whatever remedy Sec. 162 is now regarded as con-

ferring, it is clear that at the time this suit was brought they were not regarded in Kentucky as sufficiently adequate to oust the jurisdiction of equity to enjoin the illegal collection of taxes (citing cases). * * * *Nor is the equitable jurisdiction lost because since the filing of the bill an adequate legal remedy may have become available* (citing cases)."

IV.

The cases relied upon by the two judges in the District Court do not justify denial of an injunction in this case.

The two judges in the District Court referred to but three decisions of the Nebraska Supreme Court, as supporting their conclusion that the writ of error under the new statute would furnish an adequate remedy. The case principally relied upon was *Sioux City & Pacific R. R.* v. *Washington County,* 3 Neb. 30, decided fifty years ago, under a different statute and entirely different facts. It arose on an appeal to a district court from an order of a board of county commissioners, increasing plaintiff's assessment without notice or hearing, to which plaintiff was entitled, and at a time when it was alleged the statutory power of the board had expired. The District Court affirmed the board but the judgment was reversed by the Supreme Court, on writ of error, on the ground that the board, disregarding the time fixed by statute for its meeting, had met after its statutory power had expired, and had increased plaintiff's assessment without notice or hearing to which plaintiff was entitled.

In referring to this case Judge Lewis said (Tr., 194):

> "It is held in the Third Nebraska that the County Board of Equalization when it acts beyond its authority, or unjustly to the taxpayer is subject to be reviewed in that respect in the Supreme Court."

Of course it was unjust to the taxpayer to raise his assessment without notice and at a time when the statutory authority of the board had expired, but it was not because of the *injustice* that the Supreme Court set aside its order; it was because the board had exceeded its statutory power and acted without jurisdiction, which irregularities were apparent from the record and within the scope of review on writ of error.

Judges Lewis and Munger also referred to *McGee et al.* v. *State ex rel. North American Cattle Co.* 32 Neb. 149, 49 N. W. 220, which was an action, brought in the District Court, for mandamus to compel the County Board of Equalization to reassemble and correct its record of an increase of plaintiff's assessment made without notice and without jurisdiction. The Supreme Court held that mandamus was not a proper remedy but said that a petition in error to the District Court would have been the remedy to set aside the unauthorized action of the County Board, citing *Sioux City & Pacific Railroad* v. *Washington County,* 3 Neb. 30.

The third and last case referred to by Judge Lewis and Judge Munger was *State ex rel.* v. *Board of Equalization and Assessment,* 81 Neb. 139, 115 N. W. 789, an action for mandamus against the State Board of Equalization to compel it to reconvene and make a record of special findings with reference to the assessment of the property of the railroad, among the other things to show what allowance it had made for the fact that all other property in the state was valued for taxation at less than actual value. The Supreme Court held that the State Board could not be required, by mandamus, to make the record in question; that the board had original and exclusive jurisdiction of valuation and assessment of railroads and was given a wide discretion in the exercise of its powers and duties in that behalf; that the returns made by the

railroad were not conclusive; that the State Board was authorized, from all information it was able to obtain, to find the true value of the property; that it was the duty of the board to consider all facts entering into such value but that as it was not practicable or possible to find the exact value of different items of property and as conclusions of the board were in the nature of a compromise of the views of the individual members, the board should not be required to state the particular value of several items leading up to the final valuation. The court further held that while there was no provision for an appeal from the final order of the board, nevertheless the railroad might prosecute an error proceeding to the District Court of the county in which the board sat, citing *Sioux City & Pacific Railroad* v. *Washington County, supra;* that to make such error proceeding effective the rulings of the board must have been challenged and exceptions to such rulings made a matter of record; that this might be done if the matters presented were such as should be recorded but where they were not properly part of the record they must be preserved, if at all, by a bill of exceptions; that the statute did not require the board to keep a record of its interlocutory rulings or the reasons therefor but that the record of the board should show all the steps required by statute to show that the board acted within its jurisdiction; the court then said:

> "As clearly pointed out in *State* v. *Savage* the field of review of the action of a taxing board is only a narrow one at best and this renders it the more essential that due regard be paid to the rights of the taxpayer during its proceedings."

The decision of the case was that the statute did not require the board to make a record of the matters in question and therefore a writ of mandamus would not issue to compel it to do so. By dictum the court endeavored to indicate to plaintiff a possible method of pre-

serving exceptions to the rulings of the board, saying they must be presented, *"if at all,"* by a bill of exceptions.

However, in the recent case of *Chicago & N. W. Ry. Co.* v. *City of Albion,* 192 N. W. 233, decided February 27, 1923, where a local board of equalization refused to make a record of the evidence upon which it relied and such refusal was preserved in a bill of exceptions, the Supreme Court of Nebraska held, *on appeal,* that even though the only evidence in the bill of exceptions was that offered by the railroad company, nevertheless the board would be presumed to have acted upon information and knowledge of the property, and the assessment would not be held erroneous. As the State Board is authorized to act on its own knowledge and information, it is difficult to see how a bill of exceptions would be effective in error proceedings from the board.

Keokuk & Hamilton Bridge Co. v. *Salm,* 258 U. S. 122.

The case principally relied upon by Judges Lewis and Munger as justifying their denial of appellant's application for an interlocutory injunction because of the Nebraska statute, was the Keokuk & Hamilton Bridge case. Under the Illinois statutes, as pointed out by Justice Brandeis in that case, a taxpayer is not in danger of being deprived of property without due process of law or of the equal protection of the law by any act of the *assessing officers,* because there are ample opportunities both to question the amount and validity of an assessment before administrative tribunals and to resist collection of discriminatory taxes in actions which must be brought by the state in court to collect the taxes.

As said by the court in the *Keokuk Bridge case,* p. 124:

> "Every such assessment made by the county assessors is subject to revision by them. Moreover upon complaint in writing that an assessment is in-

correct, a Board of Review is required to give a hearing and to correct the assessment 'as shall appear to be just.' "

The Keokuk Bridge Company had not availed itself of those methods of administrative correction.

In Nebraska there is no statutory provision authorizing revision of an assessment by the State Board; the complaint filed by appellant was allowed only as a matter of grace. Appellant was vigilant in its efforts to obtain relief from the State Board, even going beyond the statute. In Nebraska there is no administrative correction of an assessment by any other tribunal. The review by the Supreme Court could be only a judicial review.

This court said, page 125 of the *Keokuk* case:

> "In Illinois, payment of taxes as finally assessed and extended against real estate is enforced, in the first instance, not by distraint or levy, but by legal proceedings. An application is made by the collector to the County Court for judgment against the property. The proceeding in the County Court is a civil suit for the collection of a debt. The owner may appear and defend on any legal ground; among others, that the assessment was deliberately or fraudulently discriminatory and that hence, the tax is void.
>
> From the judgment of the County Court an appeal may be taken to the Supreme Court of the state upon giving a bond to pay the amount of the assessment and costs; and the appeal will operate as a supersedeas if the appellant deposits with the county collector an amount equal to the amount of the judgment and costs."

In Nebraska payment of taxes is enforced in the first instance by distraint and levy (Secs. 5984, 6011 and 6015), or in the case of corporations, by demanding from any agent in the county the money in his hands, with criminal penalties on the agent for failure to comply.

(Sec. 6017.) No suit is necessary to obtain judgment for taxes in Nebraska and the taxpayer has no opportunity to defend.

In the *Keokuk Bridge* case, this court said, page 125:

> "In Illinois, where it is claimed that a tax is void because of over-valuation which is fraudulently discriminatory the courts of the state will grant relief in equity if the plaintiff has sought correction from the Board of Review and failed to secure redress."

In Nebraska the statute (Sec. 6018) forbids injunctions to restrain the collection of taxes except on the ground that the tax was assessed for an unauthorized or illegal purpose.

In the *Keokuk* case, at page 125, this court said:

> "There is no basis for the contention that a resort to a suit such as this was necessary to prevent, either a sale for an illegal tax creating a cloud on title, or multiplicity of suits to recover back the tax or other irreparable injury."

Under the Nebraska statute delinquent taxes are a first lien upon real estate; no sale is necessary to create a cloud on title; the statute does that. Appellant's petition showed that multitudinous suits would arise out of the levy and sale of its property, seizure of its funds and arrest of its agents in seventy-two counties in the state; that the excessive taxes would be wholly lost to appellant without hope of recovery back and that appellant would sustain irreparable injury in its business by the seizure of its property and equipment, and interruption of its business as a common carrier.

The writ of error to the Supreme Court would not operate as a supersedeas; regardless of such writ of error the liens would have attached and the county treasurers have been required by statute to collect the taxes.

In the Keokuk case this court said:

> "The bill fails, also, for another reason, to state

a case entitling plaintiff to relief * * * under such circumstances a plaintiff seeking an injunction must aver payment or tender of the amount of taxes confessedly due, or at least offer to pay such amount as the court may find to be justly or equitably due." (p. 125.)

Appellant's bill offered to pay such amount of the tax as the court found due; the court ordered payment of seventy-five per cent.

The importance of these distinctions is manifest from the recent decision of this court in *Wilson et al.* v. *Illinois Southern Ry. Co.* October Term, 1923, No. 131, January 14, 1924; 44 Sup. Ct. 203. Like the Keokuk Bridge case, the Wilson case was a bill to restrain collection of taxes in Illinois. However, notwithstanding the liberal provisions in Illinois for correcting erroneous assessments and resisting collection of taxes thereon, in the Wilson case this court held that equitable relief was necessary to prevent multiplicity of suits, the property being in five counties, and distinguished the Keokuk Bridge case where the assessment was in a single county.

The statutes of Illinois provide one appeal from the state tax commission to the Circuit Court, upon the record of the evidence and proceedings before the commission, with a further appeal to the Supreme Court. Referring to that appeal this court said in the Wilson case:

> "How far such an appeal would be adequate upon a charge of fraud against the commission may be doubted, and the adequacy of the remedy at law must be clear. *Union Pacific R. R. Co.* v. *Weld County*, 247 U. S. 282, 285, 286."

The other cases cited by Judge Lewis and Judge Munger, are:

Pittsburgh, etc. Ry. v. *Board of Public Works*, 172 U. S. 32.

At p. 37, the court said:

> "The collection of taxes assessed under the authority of the state is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and *that there are special circumstances bringing the case under some recognized head of equity jurisdiction.*" (Italics ours.)

This court pointed out, p. 44, that the statute provided that the assessment by the Board of Public Works should be final, unless the Railroad Company within thirty days after knowledge thereof appealed to the Circuit Court; that the assessment was *subject to full review by the* Circuit Court which was authorized to hear all evidence and confirm or *correct the valuation fixed by the board and to fix the true value of the property in question;* and that the right of appeal to the Circuit Court and the right to be heard and to offer evidence *before the valuation of its property for taxation was finally fixed afforded plaintiff ample opportunity to protect its interest.* The bill did not allege that there was any fraud in the assessment, that defendants had made any attempt to interfere with plaintiff's control of its real estate or that plaintiff had taken any appeal from the decision of the board to the Circuit Court of the county. The Pittsburgh Ry. had not called upon the administrative machinery provided by the state for the correction of erroneous assessments, and there were no grounds for equitable interference to prevent multiplicity of suits, cloud or title or irreparable injury. The cases cited by this court in the Pittsburgh Ry. case demonstrate this distinction. This court pointed out,

page 40, that in *Union Pacific Ry. Co.* v. *Cheyenne,* 113 U. S. 526, the bill showed that the levy complained of would involve plaintiff in a multiplicity of suits and would cloud the title to plaintiff's real estate, while in *Shelton* v. *Platt,* 139 U. S. 591, it appeared that complete compensation from the resulting injury could be had by recovery of damages in an action at law and there was no averment showing that plaintiff would suffer damage which was irremedial and that a court of chancery ought not to interpose except upon settled principles which govern its jurisdiction.

Dows v. *Chicago,* 11 Wall. 108, cited on page 37 of 172 U. S., holds that illegality of a tax will not justify interposition of a court of equity unless there be some special circumstances *bringing the case under some recognized head of equity jurisdiction,* such as *that the enforcement of a tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant;* that if the tax was illegal the plaintiff might have brought suit to recover back the money or for damages against the officers, so that no irreparable injury would have followed to him from its collection; and that plaintiff would not have been compelled to resort to a multiplicity of suits to determine his rights. In the Dow case the tax in question was not levied on real estate, so there was no cloud on title. However, the Union National Bank of Chicago had filed a cross bill alleging that if the bank paid the tax in question on its shares out of dividends in its hands, which it would be required to do by the law of the state, the bank would be subject to a multiplicity of suits by the shareholders. This court said, page 112 of 11 Wall.:

> "Were it an original bill *the jurisdiction of the court might be sustained on that ground.* But as a cross bill it must follow the fate of the original bill."

Indiana Mfg. Co. v. *Koehne*, 188 U. S. 681.

Under the Indiana statute original assessments are made by a Board of Review; the taxpayer may appeal to the State Board of Tax Commissioners, which has power to determine whether the property is assessable and *to increase or reduce the assessment as it may deem proper.* Also, any taxpayer may appear before the Board of County Commissioners and show that he has paid taxes wrongfully assessed, whereupon the board is required *to order refund thereof.* The bill alleged that the assessment in question constituted a cloud upon title, that there was no adequate remedy at law, that a multiplicity of suits would be avoided and that irreparable injury would be prevented. This court said at p. 684:

> "It has long been the settled doctrine of the federal courts that the mere illegality of a tax, or the mere fact that a law upon which the tax is founded is unconstitutional, does not entitle a party to relief by injunction against proceedings under the law, but it must appear that the party has no adequate remedy by the ordinary process of the law, *or that the case falls under some other recognized head of equity jurisdiction, such as multiplicity of suits, irreparable injury, etc.*" (Italics ours.)

This court then held that the averment of cloud on title was not sustained; that the averment that plaintiff was without an adequate remedy at law was answered by the provisions of the Indiana statute which provided for the payment under protest and recovery back of the taxes; that the allegation that the bill would prevent a multiplicity of suits, could not be sustained because the recovery of all the taxes paid could have been had in one suit; and that no irreparable injury was averred; and that the right to resort to a federal court as a court of equity must be founded upon some ground of equitable jurisdiction recognized by the federal courts, and that

when no such ground appears, jurisdiction in equity cannot be maintained.

Burrill v. *Locomobile Co.* 258 U. S. 34.

This was a suit *at law* in the United States District Court, against the treasurer of the State of Massachusetts to recover alleged invalid taxes. The Massachusetts statute provided that any corporation aggrieved by exaction of such taxes should apply by petition to the Supreme Judicial Court of the state and that the state should promptly repay any sum adjudged to have been illegally exacted, with provision that this remedy should be exclusive. The defendant, Burrill, contended that this Massachusetts statute was a bar to the personal suit against him as treasurer. This court sustained that contention. The point was made (p. 37) that a state cannot tie up the plaintiff to suits in its own courts, but this court said, p. 38, that the question was whether a state could not limit the right of foreign corporations and the liability of its own citizens, and this court did not perceive why the state might not provide that only the author of the wrong should be liable for it, at least when the remedy offered is adequate and backed by the responsibility of the state; that while Congress, acting under the Constitution has given to the courts of the United States jurisdiction *in equity* that, speaking broadly, is the same in all the states and follows its own rules (R. S. Sec. 913) nevertheless as to trials at common law, except where the Constitution, treaties or statutes of the United States otherwise require or provide, the laws of the states are the rules of decision (R. S. Sec. 721); that the common law of Massachusetts on the liability of persons to an action of tort may be modified by the statutes of the state, at least until constitutional rights are impaired. The court said that whether in an

otherwise proper case the proceeding given by the statute could be instituted in the federal court was not presented for decision.

As the Burrill case was an action *at law* and as this court specifically distinguished jurisdiction of the federal courts in equity from their jurisdiction at law, it is a little difficult to see what applications the case has to appellant's petition in equity.

Missouri Pacific R. Co. v. *Conway & Vilonia Road District,* 280 Fed. 401.

A decision of the Circuit Court of Appeals, Eighth Circuit, affirming judgment of the District Court for the Eastern District of Arkansas, dismissing suits in equity to enjoin road district assessments. The Arkansas statute provided that a land owner, aggrieved by the assessment of his lands, should have the right to appeal to a state chancery court, with further appeal to the State Supreme Court, for review of the assessment and the statute gave the courts full power, on hearing *to correct the assessment.* The Circuit Court of Appeals held that when a state provides a tribunal for the hearing of complaints against an assessment, such tribunal has exclusive jurisdiction, citing *Pittsburgh, etc. Ry.* v. *Board of Public Works, Indiana Mfg. Co.* v. *Koehne,* and similar cases.

McLaughlin et al. v. *St. L. S. W. Ry. Co.* 232 Fed. 579.

It was held that the railroad was not entitled to an injunction from the federal court against assessment of benefits for a road improvement, where the Arkansas statutes provided that the assessment of benefits shall first be made by a Board of Assessors, certified to the County Court, which court shall enter its findings thereon, confirming, increasing or diminishing the assessments

and the finding of the County Court shall have the force and effect of a judgment. Any property owner may appeal from such judgment to the Circuit Court of the county to *correct the assessment.* The Circuit Court of Appeals cited *Indiana Mfg. Co.* v. *Koehne,* 188 U. S. 681, *Singer Sewing Machine Co.* v. *Benedict,* 229 U. S. 481, *Pittsburgh, etc. Ry. Co.* v. *Board of Public Works,* 172 U. S. 32, and held that the petitions for injunction should have been dismissed.

McDougal v. *Mudge,* 233 Fed. 235.

Held, that an injunction should not be granted against a tax assessment where the State Tax Commission is given full power to increase or decrease all taxes, so that all property shall bear its equal and just proportion, and the petitioner did not seek relief from the Tax Commission before applying for an injunction in the federal court.

Baldwin Tool Works et al. v. *Blue,* 240 Fed. 202.

A suit in equity to restrain the enforcement of certain taxes in West Virginia. The West Virginia statute provided that any taxpayer feeling aggrieved by the assessment made by the State Tax Commissioner, could apply to the Board of Public Works *for a hearing and correction* of such assessment and the board had full power to *make such order as might appear to be just and lawful.* It was held that as petitioner had not endeavored to obtain correction of the assessment, the federal court of equity should not interfere by injunction, citing *Indiana Mfg. Co.* v. *Koehne,* 188 U. S. 681.

The decisions referred to by Judges Lewis and Munger may be classified as follows:

1. *Dows* v. *Chicago,* 11 Wall. 108; *Hannewinkle* v. *Georgetown,* 15 Wall. 547; *State Railroad Tax Cases,* 92 U. S. 575; *Shelton* v. *Platt,* 139 U. S. 591,

and *Keokuk & Hamilton Bridge Co.* v. *Salm*, 258 U. S. 122, holding that mere illegality of a tax will not alone justify equitable relief, in the absence of such grounds of equity jurisdiction as cloud on title, irreparable injury or multiplicity of suits.

2. *Pittsburgh, etc. Ry.* v. *Board of Public Works*, 172 U. S. 32; *Indiana Manufacturing Co.* v. *Koehne*, 188 U. S. 681; *Keokuk & Hamilton Bridge Co.* v. *Salm*, 258 U. S. 122; *Missouri Pacific R. Co.* v. *Conway & Valonia Road District*, 280 Fed. 401; *McLaughlin* v. *St. Louis Southwestern R. Co.* 232 Fed. 579, and *McDougal* v. *Mudge*, 233 Fed. 235, in each of which the assessment in question was *not final* but was subject to an administrative review by some other tribunal, which had power to hear evidence and *fix final valuation*.

In *Pittsburgh, etc. Ry.* v. *Board of Public Works*, and the other cases grouped with it, the final action had not been taken and the parties complaining in the federal court had not called upon the administrative machinery provided by the state for the correction of erroneous assessments. Had they pursued the statutory methods for the correction of the alleged erroneous valuations in those cases, the reviewing tribunals had the power to make the orders which the assessing officers should have made. In this case the assessment by the State Board was final, and any review on error proceedings in the Supreme Court of Nebraska was purely judicial. It is not claimed that the Nebraska Court had the power to hear evidence or fix the amount of appellant's assessment. The judicial stage having been reached appellant was free to assert its rights in the federal court. A citizen of Illinois cannot be tied up in the state courts of Nebraska or deprived of its rights, under the Constitution and laws of the United States, to litigate, in the federal court, *judicial questions*.

CONCLUSION.

The action of the District Court is not sustained by the cases cited. In some it was held that a taxpayer by a suit at law, could recover taxes paid under protest, and in one suit prevent cloud on title, multiplicity of suits and irreparable injury. It is not contended that appellant in the case at bar had any such right of action for recovery of taxes. In other cases cited the taxpayer had not availed of the administrative agencies provided by the state for correction of assessments. The Nebraska statutes do not provide what this court described as "appeal in the legislative stage." The assessment of appellant's property by the State Board was final and it was clear that "in its final legislative action" the state would not respect appellant's right to equality in taxation. The Nebraska Supreme Court, limited by the state constitution to *judicial* functions, could not correct the legislative act of the State Board, and under the practice on writ of error, could do no more than examine the regularity of the proceedings of the board. Such a review was purely judicial. Not only was it doubtful and uncertain, but it was not an exclusive remedy. There being diversity of citizenship and requisite amount in controversy, appellant could assert its rights in the Federal Court. The District Court erred in refusing to exercise the equity jurisdiction conferred upon it by the Constitution and laws of the United States. The order denying appellant's application for an interlocutory injunction should be reversed.

Respectfully submitted,

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APPENDIX.

The following sections of the Nebraska Compiled Statutes, 1922, are cited in the foregoing brief:

Article II.

Section 5820. *Actual valuation.*—All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. "Actual value," as used in this Act, shall mean its value in the market in the ordinary course of trade.

Section 5822. *Real property taxes—first lien.*—Taxes on all real property shall be a first lien thereon from and including the first day of December of the year in which they are levied until the same are paid, except general city taxes on real property within the corporate limits of cities of the metropolitan class, which shall be a first lien thereon from and including the first day of May following the levy, until the same are paid.

Section 5823. *Personal property taxes—first lien.*—Taxes assessed upon personal property shall be a first lien upon the personal property of the person to whom assessed from and after the first day of November of the year in which they are assessed, until paid.

Section 5825. *Taxes—first lien.*—All general taxes due the state and its governmental subdivisions shall be a first lien on the real estate on which levied, and takes priority over all other encumbrances and liens thereon.

Article V.

Section 5839. *Railroad assessment.*—The State Board of Equalization and Assessment is hereby empowered, and it is made its duty, to assess all property of the railroads and railroad corporations in the State of Nebraska. Provided, however, that all machine repair shops, general office buildings, store houses, and also all real and personal property outside of right-of-way and depot grounds, as of and belonging to any such rail-

road and telegraph companies, shall be listed for purposes of taxation by the principal officers or agents of such companies with the assessors of any precinct of the county where such real or personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property.

SECTION 5840. *Railroad assessment—time of.*—The board on the first Monday of May of each year shall proceed to ascertain all property of any railroad company owning, operating or controlling any railroad or railroad service in this state, which for the purpose of assessment and taxation, shall be held to include the main track, side track, spur tracks, warehouse tracks, roadbed, right-of-way and depot grounds, and all water and fuel stations, buildings and superstructures thereon, and all machinery, rolling-stock, telegraph lines and instruments connected therewith, all material on hand and supplies provided for operating and carrying on the business of such road, in whole or in part, together with franchises and all other property of such railroad company used or held for the purpose of operating its road, and appraise and assess the same as personal property as herein provided.

SECTION 5841. *Annual statement to board by railroad.* —On or before the fifteenth day of April in each year, the person, company or corporation owning, operating or controlling any railroad or railroad service in this state, shall, by its president, secretary or principal accounting officer, return to the State Board of Equalization and Assessment a sworn statement or schedule of the property of such company on the thirty-first day of March preceding, as follows:

(1) Of the right-of-way, track and roadbed, giving the entire length of the main track in this and other states, and showing as to this state the portion in each governmental subdivision;

(2) The length of each side or second track and turnout, spur and warehouse track and aggregate length of such side or second track, turn-out, spur and warehouse tracks, together with the name of the governmental subdivision in which such side or second track and turn-outs, spur and warehouse tracks are located;

(3) A complete list giving size, location as to governmental subdivision, material and value of all depots, station houses, machine shops, stockyards, scales or other buildings situated wholly or in part on the right-of-way, together with all platforms, fuel and water stations, and the machinery and tanks connected therewith.

(4) Showing the number of ties in track per mile, the weight of iron or steel rails per yard, used in the main or side track; what joints or chairs are used in track, kind of ballasting; length of time iron or steel has been used, and what length of time the road has been built;

(5) A full list of the rolling stock belonging to or operated by such road, which shall distinctly set forth the number, class and value of all locomotives, passenger cars, dining cars, express cars, mail cars, baggage cars, grain cars, box cars, horse cars, cattle cars, coal cars, flat cars, wrecking cars, pay cars, and all other kinds of cars, owned or used by such company, whether within or without the State of Nebraska, together with a statement of the number of miles traveled by each of the classes of cars over the line of such company within the State of Nebraska and without the State of Nebraska, separately, during the year preceding the first day of January last past;

(6) A statement or schedule showing: (1) The amount of capital stock authorized, and the number of shares into which said capital stock is divided; (2) The amount of capital stock paid up; (3) The market value of such stock, or if of no market value, then the true value of the shares of stock; (4) The total amount of all secured and unsecured indebtedness, except for current expenses of operating the road; (5) The location and actual valuation of all its real estate and personal property in this state that is locally assessed. Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the State Board of Equalization and Assessment, which values shall be taken into account and be considered in arriving at the true value of such railroad property and its franchises;

(7) A correct return of the value of all tools and materials used for repairs, and of all other personal property in the State of Nebraska, together with such other information as the State Board of Equalization and As-

sessment may require in order to enable them to apportion such rolling stock between the main line and branches of the road;

(8) A true statement of all bridges, showing where located as to governmental subdivisions, the true value thereof, kind and material, the length, width and height of such structure;

(9) The total gross earnings and net earnings of said corporation during the year for which said statement is made, and the total amount expended in the operation and maintenance of the property and the improvements thereof, distinguishing that expended in improvement or betterment from that expended in maintenance and operation; also the dividend last declared upon its shares and the amount thereof, and the date, number and the amount of all dividends declared upon its stock during the year next preceding the date of such report, and such other information as the State Board may in writing require, all of which shall be taken into consideration in ascertaining and fixing the value of such road and the franchise thereof, together with such other information as the State Board may require in relation thereto.

SECTION 5842. The returns of railroad companies or corporations shall not be held to be conclusive as to the value of the property, but the State Board of Equalization and Assessment shall, from all the information which it is able to obtain, including records of the Railway Commission or other regulatory body, find the true value of all such property, including tangible property and franchises, and shall assess the same on the same basis as other property is hereby required to be assessed. The valuation of each mile shall be determined by dividing the whole value by the number of miles of the main track of each road or line.

SECTION 5845. *Power to require attendance before board—penalty.*—The State Board of Equalization and Assessment shall have power to require the attendance before it of any officer, agent or servant of any railroad or railway company having any portion of its property in this state, to answer under oath such questions touching said property as may be propounded by the Board. The Board shall have power to issue whatever notice or process may be necessary to compel the attendance

of any such person as a witness, which process may be served by any person deputed by the Board for that purpose. Any person who shall fail to respond to such process, or who shall refuse to answer any proper question put to him by the Board, shall forfeit the sum of five hundred dollars, to be recovered in a civil action prosecuted in the name of the state.

SECTION 5847. *Board returns to county clerk—trackage.*—The State Board of Equalization and Assessment, after having valued and assessed all the railroad property in this state in accordance with the provisions of this article, shall immediately make return to the County Clerk of each and every county in which any portion of the railroad property as designated in this article may be located, to be used as the basis of levy for the county and governmental subdivisions through which any railroad or part thereof may extend.

SECTION 5848. *Contents of return.*—Such return shall include the following:

(1) Number of miles of track of each railroad located in each governmental subdivision in the county, and the total length of such road in the county;

(2) The average valuation per mile of such road;

(3) The valuation that shall be placed to the credit of such governmental subdivision in the county.

SECTION 5849. *Board returns to county clerk—real property.*—The State Board shall transmit to each county, as soon as practicable after receiving returns from the railroad company, a statement from such returns showing as to each county and railroad all machine and repair shops, general office buildings, storehouses, and also all real and personal property outside of such railroad right-of-way, and depot grounds, not included in the property herein required to be assessed by the State Board of Equalization and Assessment, and in what governmental subdivisions located, which return shall be for the benefit of the county board and local assessors.

SECTION 5850. *Apportionment.*—Railroad property assessed by the State Board shall be apportioned by the County Clerk among the respective governmental

subdivisions in which the same may be entered on the tax list and collected by the County Treasurer.

ARTICLE VI.

SECTION 5883. *Limitations of article.*—This article shall not apply to, nor in any manner affect, the assessment, equalization, levy or collection of any state, county, township, school district or road district tax, nor shall it affect any assessments or levies heretofore made upon any property in the State of Nebraska. Nor shall this article be construed to affect any specific tax which may now or which shall hereafter be provided for by law, upon the property or business of any company or association within this state.

ARTICLE XVI.

SECTION 5971. *Board—clerk.*—The county board, the county assessor and county clerk shall constitute the County Board of Equalization and the county clerk shall be the clerk of said board.

SECTION 5972. *Sessions—duties.*—The county board shall hold a session of not less than three and not more than twenty days, for the purpose contemplated in this section, commencing on the first Tuesday after the second Monday of June each year and shall:

First—Fairly and impartially equalize the valuation of the personal property of the county, and to that end shall, on the application of any person who shall deem himself aggrieved, or who shall complain that another is assessed too low, review the assessment and correct the same as shall appear to be just.

Second—At its meeting in 1912 and every second year thereafter equalize the valuation of real property of the county by raising the valuation of such tracts and lots as are assessed too low, and lowering the valuation of such tracts and lots as are assessed too high; but in cases of evident error of assessment or of apparent gross injustice in overvaluation or undervaluation of real property, the county board of equalization may at its annual meetings consider and correct the same by raising, after due notice has been given to the interested party or parties, or by lowering the assessed valuation of such real property. In cases where farm lands or

real property consisting of city, town, or village blocks or lots have been assessed as entities and after time of such assessment part or parts of such entities have been transferred by the owner or owners thereof to another party or to other parties by sale or otherwise, then the county board may at such annual meeting as board of equalization apportion the just and equitable proportion of the assessed valuation of such entities to the various parcels of lands into which such entities have by transfer of title been divided, upon notice given to the parties of such transfer.

Third—Ascertain whether the valuation of one township, precinct or district bears just relation to all townships, precincts or districts in the county; and may increase or diminish the aggregate valuation of property in any township, precinct or district, by adding or deducting such sum upon the hundred as may be necessary to produce a just relation between all the valuations of the property in the county. It may consider lands, village or city lots and personal property and different classes of personal property, except property assessed or valued by the state board of equalization and assessment, separately, and determine a separate rate per cent of addition or reduction for each of the classes of property as may be necessary to adjust the equalization thereof.

Fourth—Adjust assessments for the county by raising or lowering the assessment of any person as to any or all items of his assessment in such manner as to secure the listing of property at its actual value and the assessment of property at its taxable value; but in no case shall the assessment of any person be raised by the board until such person or his agent shall be previously notified, if such person or his agent be found in the county.

Fifth—Also add to the assessment rolls any taxable property not included therein, assessing the same in the name of the owners thereof as the assessor should have done, but no personal property shall be so added unless the owner thereof is previously notified, if he be found in the county.

Section 5975. *Appeals.*—Appeals may be taken from any action of the county board of equalization to the district court within twenty days after its adjournment,

in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county. No appeal shall in any manner suspend the collection of any tax, or the duties of officers relating thereto, during the pendency of the same, and all taxes affected thereby, which may be collected, shall be kept by the treasurer in a special fund without distribution. The court shall hear the appeal as in equity and without a jury, and determine anew all questions raised before the board which relate to the liability of the property to assessment or the amount thereof, and any decision rendered therein shall be certified by the clerk of the court to the county clerk, who shall correct the assessment books in his office accordingly. If the tax books have been delivered to the treasurer of the county for the collection of such tax before the determination of such appeal in the district court, a copy of such decision shall be certified to the treasurer of the county, who shall thereupon distribute or return such tax so held, in accordance with such decision, and the treasurer shall correct his record to conform to such decision, unless a further appeal be taken to the supreme court, in which case the treasurer shall hold said tax until the final determination of the appeal in that court.

SECTION 5977. *Abstract prepared by assessor.*—The county assessor, immediately after the board of equalization shall have completed its labors, shall prepare an abstract of the assessment rolls of his county on blanks to be furnished by the state board (the values to be given shall be equalized and corrected by the county board), and forward it to the state board of equalization and assessment on or before the tenth day of July. Such abstract shall contain: The total number of acres of taxable land in the county under cultivation; the total number of acres of taxable land not under cultivation; the total number of acres of taxable land in the county; the aggregate actual value of all taxable lands; the aggregate assessed value of all taxable lands; the average actual value per acre of all taxable lands; the average assessed value per acre of all taxable lands; the number of improved town lots; the number of unimproved town lots; the average actual value of each town lot; the aggregate actual and assessed value of all town lots; the aggregate value of all personal property; the total value of all taxable property.

	Number.	Assessed Value.
Number of horses	.....	.....
Number of cattle	.....	.....
Number of mules and asses	.....	.....
Number of sheep	.....	.....
Number of hogs	.....	.....
Number of goats	.....	.....
Number of farm implements	.....	.....
Number of wagons	.....	.....
Number of pleasure carriages, every description	.....	.....
Number of gold watches	.....	.....
Number of silver watches	.....	.....
Plate and jewelry	.....	.....
Number of pianofortes	.....	.....
Other musical instruments	.....	.....
Interest on bonds of the United States, amount	.....	.....
Bonds and interest on bonds of any state, county, district or municipality, value	.....	.....
Other bonds not exempt from taxation, value	.....	.....
Stock in any company or corporation, value	.....	.....
Shares in national bank, amount	.....	.....
Stocks in any company or corporation, value	.....	.....
Moneys, amount	.....	.....
Credits, value	.....	.....
Value of merchant's stock	.....	.....
Value of merchant's moneys and credits	.....	.....
Value of manufacturer's stock	.....	.....
Moneys and credits of manufacturers	.....	.....
Shares of interest in any vessel or boat	.....	.....
Tax sale certificates	.....	.....
Judgments	.....	.....
Notes secured	.....	.....
Notes unsecured	.....	.....
Mortgages securing obligations, other than notes	.....	.....
Aggregate value of all other personal property	.....	.....

SECTION 5979. County board of equalization shall adjourn from time to time until the action of the State Board of Equalization and Assessment shall have been had and certified to the county clerk, and, on the last day of sitting as a board of equalization, the county board shall levy all the necessary taxes for the current year.

SECTION 5984. *Tax list—when delivered—warrant for collection.*—The tax list shall be completed and delivered to the county treasurer on or before the first day of November annually, and before its delivery the county clerk shall attach a warrant under the seal of the county, which warrant shall be signed by the clerk and shall in general terms command the treasurer to collect the taxes therein mentioned according to law; but no informality therein, and no delay in delivering the same after the time above specified, shall affect the validity of any taxes or sales, or other proceedings for the collection of taxes as provided for in this chapter. Whenever it shall be discovered that the warrant in this section provided for was not at the proper time attached to any tax list, for any preceding year or years, in the hands of the county treasurer, the county clerk shall forthwith attach such warrant, which shall be in the same form, and shall have the same force and effect as if it had been attached to such tax list before the delivery thereof to the county treasurer.

SECTION 6011. *Distress warrants—service—return.*—All distress warrants issued by the treasurer for the collection of taxes shall be served by the sheriff of the county in the same manner as process issued by the district court and he shall make returns of the same to the treasurer of the county within sixty days from the date of issue, with an indorsement thereon showing that the taxes therein described have been collected or that, upon diligent search, no property could be found whereof to collect the same. For making a false return the officer shall be liable for double the amount of taxes, with interest and costs, to be recovered in the name of the county.

SECTION 6015. *Distress warrants—sale.*—When any goods and chattels have been taken on any distress warrants, they shall be returned to the owner by the officer having distrained them immediately upon payment of

the taxes due with interest and costs, but upon such owner's refusal or neglect to make such payment, or to give a good and sufficient bond for the delivery of the goods and chattels, the officer distraining shall keep them at the expense of the owner and shall give notice of the time and place of their sale within five days after the taking, in the same manner as upon execution in justice court; and the time of sale shall not be more than twenty days from the day of taking, but he may adjourn the sale from time to time not exceeding five days in all. In case of adjournment he shall put up a notice thereof at the place of sale. Any surplus remaining above the taxes, charges of the keeping and fees for sale, shall be returned to the owner, and the treasurer shall on demand render an account in writing of the sale and charges.

SECTION 6017. *Corporate taxes delinquent.*—When any corporation doing business in this state shall fail or neglect to pay any tax assessed or charged against it, when the same shall have become delinquent, the county treasurer shall notify any agent or officer of the company in the county where such tax is delinquent that the same is delinquent, and the amount due and shall further notify the officer or agent to pay over all moneys that may be in his hands, or that may afterwards come into his hands, belonging to such corporation, not exceeding the amount of tax due, to such county treasurer; and if such agent or officer shall fail to pay over the money to the county treasurer, he shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than fifty dollars, nor more than five hundred dollars.